

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 280

ROSCO JONES, PETITIONER,

vs.

CITY OF OPELIKA

**ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
OF ALABAMA**

PETITION FOR CERTIORARI FILED JULY 16, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No.

ROSCOE JONES, PETITIONER,

vs.

CITY OF OPELIKA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ALABAMA

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[fol. 1]

{Caption omitted}

[fol. 2]

IN SUPREME COURT OF ALABAMA, FIFTH DIVISION

No. 343

Rosco Jones, Appellant,

vs.

CITY OF OPELIKA, Appellee

Appealed from Lee Circuit Court at Law

PETITION FOR WRIT OF CERTIORARI

(Submitted on Briefs May 1, 1941)

To the Honorable Chief Justice and Associate Justices of
the Supreme Court of Alabama:

Comes City of Opelika, by and through Duke & Duke, its attorneys, and respectfully petitions this Honorable Court to review, revise, reverse and hold for naught that certain judgment rendered by the Court of Appeals on March 18, 1941, wherein Rosco Jones was Appellant and the City of Opelika was Appellee, which said judgment reversed the judgment of the Circuit Court of Lee County, Alabama, and discharged Appellant from further custody in these proceedings.

Your petitioner avers that an application to said Court of Appeals for rehearing of said cause and brief in support thereof was duly filed by your petitioner on March 31, 1941, and that said application for rehearing was overruled on April 22, 1941.

Your petitioner further shows unto your Honors that the Court of Appeals erred in reversing the judgment of the Circuit Court of Lee County, Alabama, and in discharging the Appellant from further custody in these proceedings, in the following ways, to-wit:

1. The Court of Appeals erred in holding that Section 1 under Conditions and Provisions of the City License Schedule for 1939, as applied to Appellant, is invalid—void, and of no effect.

[fol. 3] 2. The Court of Appeals erred in holding that the entire City License Schedule for 1939, as applied to Appellant, was invalid—void, and of no effect, merely because Section 1 under Conditions and Provisions of the City License Schedule for 1939 was in conflict with the Fourteenth Amendment of the United States.

In view of the above, your petitioner respectfully requests that this petition for writ of certiorari be granted, directing the Court of Appeals to affirm the judgment of the Circuit Court of Lee County, Alabama.

Submitted herewith is a brief in support of this petition.

Respectfully submitted, Duke & Duke, Attorneys for Appellee.

I hereby certify that a copy of the foregoing petition for Writ of Certiorari has been delivered to Hon. Grover C. Powell, Attorney for Appellant, on the 28th day of April, 1941.

Wm. S. Duke, Attorney for Appellee.

[fol. 4] IN SUPREME COURT OF ALABAMA

The Court Met Pursuant to Adjournment.

Present: Chief Justice Gardner and Associate Justices Thomas, Boulidin, Brown, Foster and Livingston.

Knight, J., Not Sitting.

5 Div. 343

EX PARTE CITY OF OPELIKA

PETITION FOR CERTIORARI TO COURT OF APPEALS

In re ROSCO JONES

v.

CITY OF OPELIKA

[Lee Circuit Court]

JUDGMENT—May 22, 1941

Comes the petitioner by attorney, and the Petition for the Writ of Certiorari to the Court of Appeals being sub-

mitted on briefs and duly examined and understood by the Court, it is considered that said Petition be granted. And the record and matters therein assigned for errors in the Court of Appeals being submitted, and duly examined and understood by the Court, it is considered that in the record and proceedings of the Court of Appeals there is manifest error. It is therefore considered that the judgment of the Court of Appeals be reversed and annulled, and the cause remanded to said Court for further proceedings therein. It is also considered that Rosco Jones pay the costs incident to this proceeding.

[fol. 5]

IN SUPREME COURT OF ALABAMA.

[Title omitted]

OPINION—Filed May 22, 1941

THOMAS, Justice:

The certiorari seeks to review the ruling of the Court of Appeals in Rosco Jones v. City of Opelika, — So. —, wherein it was held that an ordinance of the City of Opelika was void as applied to the defendant. The motion for rehearing which was denied by the Court of Appeals is, in part, as follows:

“The Court of Appeals erred in holding that Section 1 under Conditions and Provisions of the City License Schedule for 1939, as applied to Appellant, is invalid—void, and of no effect.

“The Court of Appeals erred in holding that the entire City License Schedule for 1939, as applied to Appellant, was invalid—void, and of no effect, merely because Section 1 under Conditions and Provisions of the City License Schedule for 1939 was in conflict with the Fourteenth Amendment of the United States.”

[fol. 6] The opinion now sought to be reviewed, among other things, found:

“Appellant, when arrested, was going about the streets of the City of Opelika, holding two little pamphlets in his hand, and saying to the public: ‘Get your two copies for five cents.’

"Copies of the two pamphlets mentioned are before us, and we find in them nothing obscene or immoral; or which advocates unlawful conduct; or which is calculated to 'disturb public order.'"

"Appellant is an ordained minister of the gospel of Jehovah's Kingdom and (as he contends, without dispute in the testimony) one of Jehovah's witnesses, consecrated to bear witness concerning the Kingdom of Jehovah God. The sole mission of the pamphlets is to set forth the gospel of the Kingdom of God as he believes and preaches it. "He did not, he says, apply for or obtain a license (to 'peddle' his pamphlets) because he regarded himself as sent by Jehovah God to do his work and believes that such application would have been an act of disobedience to Jehovah's Commandments which would result in his eternal destruction.

"Appellant was tried in the Recorder's Court of the City of Opelika, and convicted, on the charge of selling or offering to sell books without a license being first obtained from the Clerk of said city as required by the city ordinance."

The judgment of the Court of Appeals is based on the case of *Lovell v. City of Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. ed. 949, where Mr. Chief Justice Hughes said:

"The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is an essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' *Ex parte Jackson*, 96 U. S. 727, 733. The license tax in *Grosjean v. American Press Co.*, 297 U. S. 233, 245, 246, was held invalid because of its direct tendency to restrict circulation.

"As the ordinance is void on its face, it was not necessary for appellant to seek a permit under it. * * *

In *Schneider v. State (Town of Irvington)*, 308 U. S. 147, 84 L. ed. 155, the above case was explained by Mr. Justice Roberts, as follows:

"As said in *Lovell v. Griffin*, 303 U. S. 444, 82 L. ed. 949, 58 S. Ct. 666, *supra*, pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people.

On this method of communication the ordinance imposes [fol. 7] censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees.

“We are not to be taken as holding that commercial soliciting and canvassing may not be subject to such regulation as the ordinance requires. Nor do we hold that the town may not fix reasonable hours when canvassing may be done by persons having such objects as the petitioner. Doubtless there are other features of such activities which may be regulated in the public interest without prior licensing or other invasion of constitutional liberty. * * *

In *Cox v. State of New Hampshire*, Sup. Ct. Law. ed. Advance Opinions, Vol. 85, No. 11, p. 702, Mr. Chief Justice Hughes said, of an ordinance imposing a tax on parades, as follows:

“As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorably associated with resort to public places. *Lovell v. Griffin*, 303 U. S. 444, 451, 82 L. ed. 949, 953, 58 S. Ct. 666; *Hague v. Committee for Industrial Organization*, 307 U. S. 496, 515, 516, 83 L. ed. 1423, 1436, 1437, 59 S. Ct. 954; *Schneider v. Irvington*, 308 U. S. 147, 160, 84 L. ed. 155, 164, 60 S. Ct. 146; *Cantwell v. Connecticut*, 310 U. S. 296, 306, 307, 84 L. ed. 1213, 1219, 1220, 60 S. Ct. 900, 128 A. L. R. 1352.

“It was with this view of the limited objective of the statute that the state court considered and defined the duty of the licensing authority and the rights of the appellants to a license for their parade, with regard only to considera-

tions of time, place and manner so as to conserve the public convenience. * * *

"The decisions upon which appellants rely are not applicable. In *Lovell v. Griffin*, 303 U. S. 444, 82 L. ed. 949, 58 S. Ct. 666, *supra*, the ordinance prohibited the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the city manager, thus striking at the very foundation of the freedom of the press by subjecting it to license and censorship. * * *

"In *Schneider v. Irvington*, *supra* (308 U. S. p. 163, 84 L. ed. 165, 60 S. Ct. 146) the ordinance was directed at canvassing and banned unlicensed communication of any views, or the advocacy of any cause, from door to door, subject only to the power of a police officer to determine as a censor what literature might be distributed and who might distribute it. In *Cantwell v. Connecticut*, *supra* (310 U. S. p. 305, 84 L. ed. 1218, 60 S. Ct. 900, 128 A. L. R. 1352) the statute dealt with the solicitation of funds for religious [fol. 8] causes and authorized an official to determine whether the cause was a religious one and to refuse a permit if he determined it was not, thus establishing a censorship of religion. * * * The statute, as the state court said, is not aimed at any restraint of freedom of speech, and there is no basis for an assumption that it would be applied so as to prevent peaceful picketing as described in the cases cited."

When these cases are considered, it is apparent that the *Lovell* case, *supra*, is based on ordinances that prohibited or censored the distribution of literature. It was decided on March 28, 1939. Thereafter, the case of *Schneider v. Town of Irvington*, *supra*, was decided, and it held that commercial distribution was subject to due regulation, as distinguished from the free distribution of literature, as we have indicated above.

In the instant case the defendant carried a bundle of booklets entitled "Face the Facts and learn the only way of escape," and "Fascism or Freedom." He cried "Two copies for five cents." The appellant in the *Cox* case, *supra*, and in the instant case did not apply for the permit or license required by the respective ordinances. The decision by Mr. Chief Justice Hughes was to the effect that the City of Manchester (*Cox v. State of New Hampshire*, *supra*, 85 S. Ct. 702), had the right and authority to con-

trol its streets and that the same power extended to regulation thereof by licenses. Such is the case now for decision.

It results, therefore, that the Lovell case, *supra*, is not decisive of the case at bar. The ordinances dealt with were "ordinances on prohibition or censorship" and those dealt with in the Cox case, *supra*, and in the case at bar, are licenses imposed for police protection and public order. It was held that a privilege license may be imposed without a conflict with the Constitution of the United States or any amendment thereof.

Since the decisions above referred to, the District Court of the United States has handed down a decision in *Leiby et al, v. City of Manchester*, 33 Fed. Sup. 842, where an ordinance penalizing any person "who shall sell pamphlets or magazines without first procuring a badge from the superintendent of schools was invalid on its face as applied to members of a religious cult selling literature devoted to [fol. 9] spreading of their religious beliefs, and city and its officials would be enjoined from enforcing ordinance. U. S. C. A. Const. Amends. 1, 14."

This decision was considered in *City of Manchester v. Leiby*, 117 Fed. Reporter, (2d) 661, and the court again reviewed the case of *Lovell v. City of Griffin*, *supra*, (303 U. S. 444, 58 S. Ct. 666, 82 L. ed. 949), saying:

"In our opinion the ordinance cannot be held void on its face under *Lovell v. City of Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. ed. 949 nor under any other controlling authority. The whole point of the *Lovell* case was that the practice of distributing literature of any kind, whether by sale or gratuitously, and not merely in the streets but anywhere within the city limits, was absolutely prohibited without the written permission of the city manager having first been obtained. This official, in exercising his discretion to give or withhold permission, was not even bound by any defined standards. The Supreme Court characterized the ordinance as restoring 'the system of license and censorship in its baldest form' (page 452 of 303 U. S., page 669 of 58 S. Ct., 82 L. Ed. 949), and held that it infringed the freedom of the press protected by the Fourteenth Amendment."

The opinion concluded with the statement:

"The permit required by the Manchester ordinance is of a similar sort. As the court said in the *Cantwell* case,

supra, 310 U. S., at page 306, 60 S. Ct. at page 904, 84 L. Ed. 1213, 128 A. L. R. 1352, 'Even the exercise of religion may be at some slight inconvenience in order that the state may protect its citizens from injury. Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent.'

"The decree of the District Court is reversed, with costs to the appellants, and the case is remanded to that court with directions to dismiss the complaint."

And this decision of the Circuit Court of Appeals was presented to the Supreme Court of the United States, and in 61 S. Ct. Rep. (No. 13) p. 838, the writ of certiorari was denied on April 7, 1941.

To a full understanding of these cases it is necessary to note what was also said by the circuit judge in the case in which the writ was denied. The observations contained in the opinion of Judge MaGruder were, in part, as follows: [fol. 10] " * * * the Manchester ordinance, now before us contains no element of prior censorship upon the distribution of literature. It requires only a simple routine act of obtaining a badge of identification before a person can sell on the streets. This reasonable police regulation, in our opinion, imposes no substantial burden upon the freedom of the press or the free exercise of religion.

"Under the National Prohibition Act, 27 U. S. C. A., § 1 et seq., the use of sacramental wine was subject to regulation and permit. See *Shapiro v. Lyle*, D. C., 30 F. 2d, 971. The regulations were no doubt applicable even to persons who might have believed it a gross impiety to apply for a civil permit before partaking of a divine sacrament. Similarly, as to the sacrament of marriage—one must get a marriage license from civil authority, in some states a brief waiting period is mandatory after the license is issued. These may be regarded as instances of rendering unto Caesar the things which are Caesar's; * * *"

The foregoing late decisions of the Supreme Court of the United States indicate the right of the municipality to duly

impose a license tax upon sales of tracts or booklets when one goes about the streets of a city so selling or offering to sell the same,

See also *Cantwell et al., v. State of Connecticut*, 60 Sup. Ct. Rep. 900, 310 U. S. 296; *Hague, Mayor, et al., v. Committee For Industrial Organization, et al.*, 59 Sup. Ct. Rep. 954, 307 U. S. 496.

The license schedule which was originally enacted is Schedule 146 of the 1935 Revenue Act (General Acts of Alabama, 1935, p. 499), which was amended by an act approved March 2, 1937, (Acts of Alabama, Extra Session 1936-37, p. 277), levies a license on itinerant vendors or peddlers of merchandise. There appears to be no exemption in this section for preachers or others selling books, magazines, tracts or periodicals. The 1935 Act, *supra*, Section 368-1/2, p. 564, specifically provided that the exemptions appearing in that revenue act were exclusive and all other exemptions were specifically repealed thereby.

The Code of 1940, Title 51, § 611, grants no exemptions under this schedule. There are no provisions of the revenue statutes for the state, counties or municipalities exempting ministers of the gospel from the respective license taxes exacted of all so engaged in selling, etc.

The subject of a proper nondiscriminatory license by a [fol. 11] municipality has been recently considered by this court in *Ex parte Stein*, 199 So. 13, wherein many authorities are collected. The application to the Supreme Court of the United States to review the decision in said case was denied.—61 S. Ct. Rep. (Thomas F. Stein, Jr., doing business under the name and style of Stein Brokerage Co., petitioner, *v. State of Alabama*; Facts and opinion, 29 Ala. App. 565, 199 So. 11; Ala. Sup. 199 So. 13), p. 838.

It results from the foregoing that the opinion of the Court of Appeals is founded on error and the petition for writ of certiorari is hereby granted.

Writ granted.

Gardner, C. J., Bouldin, Brown, Foster and Livingston, JJ., Concur.

Knight, J., not sitting.

[fol. 12] IN SUPREME COURT OF ALABAMA

[Title omitted]

MOTION FOR STAY AND NOTICE OF APPEAL

To the Hon. Chief Justice and Associate Justices of the Supreme Court of Alabama:

1. Comes Rosco Jones, Appellant, by and through Grover C. Powell, his attorney, leave of the Court having first been obtained, and respectfully petitions this Honorable Court as follows:

2. That on the 22nd day of May, 1941, an opinion was filed by this court in the above named and styled case, granting the petition of appellee for a writ of certiorari and reversing the judgment of the Court of Appeals in said case, and which opinion and judgment decided the case adversely to appellant.

[fol. 13] 3. That appellant, Rosco Jones, being dissatisfied with said judgment, desires and intends to file an appeal in said matter to the Supreme Court of the United States for a review of the judgment.

4. For the purpose of perfecting the necessary appeal, it is requested that a stay of ninety (90) days be granted by the court and that during that time a remittitur shall not be issued.

Wherefore, appellant prays that a stay of ninety (90) days be granted as requested herein for the purpose of allowing time to perfect the necessary appeal in said case to the Supreme Court of the United States and that during that time the judgment of this court be stayed and a remittitur shall not issue.

(Signed) Grover C. Powell, Attorney for Appellant.

Petition granted. This the 31st day of May, 1941.

(Signed) Lucien D. Gardner, Chief Justice

I hereby certify that a copy of the foregoing notice and motion for stay has been delivered to Hon. William Duke, Attorney for Appellee, on the 29th day of May, 1941, by sending the same registered mail.

(Signed) Grover C. Powell, Attorney for Appellant.

[fol. 14]

IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER GRANTING STAY OF EXECUTION—May 31, 1941

It Is Ordered that the petition for stay of execution for 90 days for the purpose, of allowing time to perfect an appeal or apply for a Writ of Certiorari to the Supreme Court of the United States in the above styled cause, be and the same is hereby granted.

[fols. 15-16]

[Captions omitted]

[fol. 17]

IN CIRCUIT COURT OF LEE COUNTY

CERTIFICATE ON APPEAL FROM RECORDER'S COURT—Filed
April 14, 1939

To the Honorable W. O. Brownfield, Clerk of the Circuit Court of Lee County, Alabama:

I hereby certify to you that on the 3rd day of April, 1939, Rosco Jones, was found guilty of violation of the City License Ordinance and was fined fifty and no/100 (\$50.00) dollars and costs and in default thereof was sentenced ninety (90) days labor for the City, by the Recorder of the Recorder's Court of the City of Opelika, Alabama; and that the said Defendant, Rosco Jones, has appealed from said judgment to the Circuit Court of Lee County, Alabama, and has filed an Appeal Bond in the amount of one hundred twenty-five and no/100 (\$125.00) dollars which said Bond has been taken and approved and is herewith handed to you.

This the 14th day of April, 1939.

(Signed) T. C. Tollison, City Clerk. (Seal.)

Bond on appeal for \$125.00 filed April 8, 1939, omitted in printing.

[fol. 18]

IN CIRCUIT COURT OF LEE COUNTY

MOTION TO TRANSFER CAUSE FROM JURY TO NON-JURY DOCKET
—Filed May 10, 1939

Now Comes the City of Opelika, Alabama, and moves the court to transfer this cause from the jury docket to the non-

jury docket, and moves the court that this cause be tried without the intervention of a jury.

(Signed) Duke & Duke, Solicitors for the City of Opelika, Alabama.

[fol. 19] IN CIRCUIT COURT OF LEE COUNTY

ORDER TRANSFERRING CASE TO NON JURY DOCKET—Filed May 25, 1939

On Appeal from Recorder's Court of City of Opelika

Comes the City of Opelika and moves the Court to transfer the above styled case from the Jury Docket to the Non-Jury Docket of this court.

Which said motion being heard, understood and considered, it is ordered that said cause be transferred from said jury docket to the non-jury docket, as prayed for in said motion.

This 25th day of May, 1939.

(Signed) W. B. Bowling, Judge.

IN CIRCUIT COURT OF LEE COUNTY

COMPLAINT—Filed November 2, 1939

1. The City of Opelika, Alabama, by its solicitors, complains of Roseo Jones, the defendant, that within 12 months before the commencement of the prosecution, he did sell books in the City of Opelika, Alabama, without first procuring a license to sell such books from the City of Opelika, Alabama, contrary to the license ordinance of the City of Opelika, Alabama.

2. The City of Opelika, Alabama, by its solicitors, complains of Rosco Jones, the defendant, that within 12 months before the commencement of the prosecution, he did operate as a Book Agent in the City of Opelika, Alabama, without first procuring a license to operate as a Book Agent from the City of Opelika, Alabama, contrary to the license ordinance of the City of Opelika, Alabama.

3. The City of Opelika, Alabama, by its solicitors, complains of Rosco Jones, the defendant, that within 12 months before the commencement of the prosecution, he did operate as a transient agent of books in the City of Opelika, Alabama, without first procuring a license to operate as a transient agent of books from the City of Opelika, Alabama, contrary to the license ordinance of the City of Opelika, Alabama.

4. The City of Opelika, Alabama, by its solicitors, complains of Rosco Jones, the defendant, that within 12 months before the commencement of the prosecution, he did operate as a transient dealer of books in the City of Opelika, Alabama, without first procuring a license to operate as a transient dealer of books from the City of Opelika, Alabama, contrary to the license ordinance of the City of Opelika, Alabama.

[fol. 20] 5. The City of Opelika, Alabama, by its solicitors, complains of Rosco Jones, the defendant, that within 12 months before the commencement of the prosecution, he did operate as a transient distributor of books in the City of Opelika, Alabama, without first procuring a license to operate as a transient distributor of books from the City of Opelika, Alabama, contrary to the license ordinance of the City of Opelika, Alabama.

(Signed) Duke & Duke, Solicitors for the City of Opelika, Alabama.

IN CIRCUIT COURT OF LEE COUNTY

DEMURRER—Filed November 2, 1939

Comes now the defendant in the above stated case, before arraignment and pleading in said case leave of the court being first had, and files this demurrer to the charge against him and says that said charge should be dismissed for the following reasons, to wit:

1. Because the charge against him sets out no offense against the City of Opelika.

2. Because paragraph eight of the ordinance is unconstitutional and void in that it is violative of the "Due

process" clause of the 14th Amendment of the United States Constitution in that it vests arbitrary powers in the members of the City Commission of the City of Opelika, vesting members of said commission with the power to grant or withhold from granting license to operate a news stand with no rule or guide to govern them in granting or withholding said license.

3. Because said paragraph eight is unconstitutional and void for the further reason that in vesting arbitrary powers in the City Commission above referred to, without a rule or guide, it violates the "Due process" clause of the Federal Constitution in that it abridges the freedom of the press.

4. The charge against the defendant should be quashed as violative of the "Due process" clause above referred to because the defendant was arrested without a warrant.

5. The license ordinance for 1939 above referred to is unconstitutional and void as violative of the "Due process" clause above referred to because it undertakes to vest arbitrary power in City Commission as shown by the following portion of the ordinance, to-wit: "All license . . . shall be subject to revocation in the discretion of the City [fol. 21] Commission, with or without notice to the Licensee," thus the commission may arbitrarily revoke any and all license for news or any other stands, with no rule or guide that would apply to all alike and with no provision of being heard and defend themselves against such revocation and with no provision of an adequate remedy to recover license paid and revoked immediately or later.

6. Said license ordinance is void and violative of said "Due Process" clause for the further reason that it undertakes to license the printed page and thus prohibit its free circulation.

(Signed) Grover C. Powell, W. A. Mason, Attorneys
for the Defendant.

IN CIRCUIT COURT OF LEE COUNTY

MOTION TO DISMISS—Filed November 2, 1939.

Comes now the defendant in the above stated case, with leave of the Court, and says that the complaint should be dismissed for the following reasons, to wit: .

1. The complaint is invalid in that it is insufficient in law and does not state facts constituting any offense under the law.

2. The ordinance here in question is invalid on its face and as applied to the acts of the defendant is unconstitutional, illegal and void by reason of the fact that it — in conflict with the "Due Process" clause of the State of Alabama and the 14th Amendment of the Constitution of the United States and denies to the defendant "Due Process of Law" in the following particulars, to wit:

(a) It denies and unduly restricts freedom of Speech and freedom of the press.

(b) It denies and unduly restricts freedom of worship, freedom of conscience and freedom of religion.

(c) It is too vague and indefinite to provide a sufficiently ascertainable standard of guilt.

(d) It grants arbitrary powers to the body of men designated the "City Commission" with no rule or standard to guide them to make it applicable to all alike and is oppressive.

(e) It undertakes to license the printed page.

[fol. 22] (f) It is applied with an unequal hand in an arbitrary manner.

(g) Because the defendant was arrested without a warrant.

(Signed) Grover C. Powell, Attorney for the Defendant.

Filed in open Court after Plaintiff has closed its case.
This Nov. 2, 1939.

IN CIRCUIT COURT OF LEE COUNTY

MOTION TO DISMISS—Filed November 2, 1939

The Defendant moves to dismiss this case and for his discharge upon the following grounds:

That the complaint is invalid and does not state facts sufficient to constitute an offense under the law;

That the ordinance in question is invalid and void by reason that it is in direct conflict with the Constitution of this State and of the United States, in this: that it restricts the freedom of speech, freedom of press, and freedom of worship of Almighty God;

That the ordinance in question is in direct violation of the Fourteenth Amendment of the Constitution of the United States.

That the evidence by prosecution shows defendant is not guilty.

The Defendant therefore prays this court to dismiss this case and that he be discharged.

(Signed) Grover C. Powell, Attorney for Defendant.

Filed in open Court at the conclusion of the offering of all the evidence. This Nov. 2, 1939.

[fol. 23] IN CIRCUIT COURT OF LEE COUNTY

JUDGMENT OF CONVICTION ON APPEAL—November 2, 1939

On this the 2nd day of November, 1939, came the parties, the plaintiff, corporation by its attorneys, and the defendant in person and by attorney, and the defendant having filed demurrer to the complaint in this cause, and the same being now heard and considered, it is ordered and adjudged by the court that said demurrer to said complaint be and it is hereby overruled; to which ruling of the court the defendant then and there duly excepted.

Issue being then joined between the parties, and this cause having by a previous order of court, been transferred to the non-jury docket of this court, the cause is heard by the court without a jury; and after the plaintiff, City of Opelika, a municipal corporation had offered its testimony, the defendant moves the court to dismiss the complaint on the grounds as stated in writing filed in the cause; and the same being heard and considered, by the court, it is ordered and adjudged by the court that said motion to dismiss be and is hereby overruled. Then after the conclusion of the offering of all the testimony, the defendant moves the court that the complaint be dismissed and defendant discharged on the grounds as stated in the paper writing on file in this cause; and the same being duly heard

and considered, it is ordered and adjudged by the court that the said motion be and is hereby overruled.

After hearing the evidence and the argument of counsel on both sides, the court finds the defendant guilty and assesses a fine of \$50.00. It is therefore considered, ordered and adjudged by the court that the plaintiff, City of Opelika a municipal corporation, have and recover of the defendant, Rosco Jones, the said sum of fifty (\$50.00) dollars, the amount of fine assessed and also the sum of one hundred, three and 05/100 (\$103.05) the amount of costs in this case for which execution may issue and as against this judgment there are no exceptions of personal property allowed the said defendant; and it is further ordered and adjudged by the court that the plaintiff, City of Opelika a municipal corporation, have and recover of John L. Griffin, Joe H. Griffin, and United States Fidelity & Guaranty Company, sureties on the defendant's appeal bond in the sum of one hundred and twenty five (\$125.00) dollars, the amount of their appeal bond in this cause, for the recovery of which let execution issue, and as against this judgment and said execution to be issued thereon, there are no exemptions of personal property allowed the said sureties, or either of them; the total amount of judgment [fol. 24] and costs being \$153.05, which is more than the amount of the appeal bond in this cause.

And now comes the defendant by his attorney and gives notice to the court that he will take an appeal and does take an appeal from the judgment of this court to the Supreme Court of Alabama. The same being considered, it is ordered by the court that the amount of bail in this cause be and is hereby fixed at two hundred (\$200.00) dollars.

(Signed) W. B. Bowling, Judge.

[fol. 25] Supersedeas Bond on appeal for \$200.00 filed Nov. 3, 1939, omitted in printing.

[fol. 26] IN CIRCUIT COURT OF LEE COUNTY

MOTION FOR NEW TRIAL—Filed December 1, 1939

Comes now the defendant and makes this his motion to set aside the judgment and for a new trial, on the judgment of conviction entered against him November 2nd, 1939,

at the Fall Term of the Circuit Court; without the intervention of a jury on the charge of violating an alleged ordinance of the City of Opelika, on the following grounds, to-wit:

1. Because the verdict is contrary to the evidence and without evidence to support it.
2. Because the verdict is decidedly and strongly against the weight of evidence.
3. Because the verdict is contrary to law and the principles of justice and equity.
4. Because the Court erred in overruling and denying defendant's demand for a jury, contrary to the Constitution of State of Alabama, Article One, Section Six, and the "Due Process" Clause of the Fourteenth Amendment of the Constitution of the United States.
5. Because the defendant was prevented from making his defense by surprise without any fault on his part. Though he demanded a copy of charges, the complaint was not given to him or his counsel until the case was called for trial contrary to the Constitution of Alabama, Article One, Section Six, and the said "Due Process" clause of the Constitution of the United States, because said charges, when examined, proved to be in the nature of an amendment, and are substantially different, charging a different offense from the charge upon which he was tried in the recorder's court.
6. Because the Venue was not proven.
7. Because the Court erred in overruling defendant's demurrer when said demurrer should have been sustained upon each and every ground thereof.
8. Because the court erred in overruling defendant's motion to dismiss made at the conclusion of the evidence for the prosecution, said motion should have been sustained upon each and every ground thereof.
9. Because the court erred in overruling defendant's motion to dismiss made at the conclusion of all of the evidence.
10. The court erred in not dismissing the charges against the defendant, the same being insufficient in law because

[fol. 27] they set out no offense against the City of Opelika, the same undertakes to, and does charge another offense from the original charge in the recorder's court as shown by the return of the recorder.

11. Because the court erred in permitting evidence to be introduced, over the timely objection of defendant, which was illegally secured, contrary to the Constitution of the State of Alabama which provides: "The people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or search", and the "due process" clause of the said Federal Constitution.

12. Because the defendant was denied a fair trial because the court ruled out all of the evidence showing that the activity at the time of the arrest, was in pursuant to and was his regular work as a minister of the Gospel, and a part of his worship and in the enjoyment of freedom of "religion", and for the purpose of promulgating his Christian belief.

13. Because the court erred in ruling out the expert testimony of Norman McCloud and Stewart M. Baker, Methodist ministers, showing that the work defendant was engaged in was the proper work of a minister of the Gospel and that alleged ordinance was applied in an arbitrary and distretionary manner, regarding the distribution of such printed matter.

14. The court erred in excluding the expert testimony of A. C. Windham, W. H. Perry, M. C. Schrader, C. M. Metzger, W. Walton, J. B. Seals, W. A. Hamilton and Jno. E. Griffin, all of whom it was agreed, in open court by counsel for prosecution, that their testimony would be the same as that given by Norman McCloud and Stewart M. Baker.

Wherefore defendant prays that the judgment be set aside and that this, his grounds for a new trial, be enquired of by the Court and that a new trial be granted him.

(Signed) Grover C. Powell, W. A. Mason, Attorneys
for Defendant.

[fol. 28] GEORGIA,

Fulton County:

Personally appeared before me an officer duly authorized to administer oaths, Grover C. Powell, attorney for defend-

ant, who on oath says that the defendant was prevented from making his defense by surprise, as related in the within and foregoing motion, and that the same is true.

(Signed) Grover C. Powell.

Sworn to and subscribed before me this November 28, 1939. (Signed) John W. Bolton, Notary Public, Georgia, State at Large. (Seal.)

IN CIRCUIT COURT OF LEE COUNTY

ORDER CONTINUING MOTION FOR NEW TRIAL—Filed December 1, 1939

It is ordered that this motion be continued for 30 days.
(Signed) W. B. Bowling, Judge.

[fol. 29] IN CIRCUIT COURT OF LEE COUNTY

ORDER OVERRULING MOTION FOR NEW TRIAL—Filed December 19, 1939

Motion to set aside verdict and grant defendant a new trial.

Upon consideration of said motion, it is Ordered that the same be and is hereby overruled.

At LaFayette, Alabama, this December 19, 1939.

(Signed) W. B. Bowling, Judge.

IN CIRCUIT COURT OF LEE COUNTY

Bill of Exceptions

Be It Remembered That in the Circuit Court of Lee County, Alabama, at the November Term, 1939, of said Court, the Honorable W. B. Bowling, upon the trial of the cause of City of Opelika vs. Rosco Jones, the following proceedings not otherwise appearing of record, were had and done commencing on the 2nd day of November, 1939.

Issue was joined between the parties as shown by the record.

Whereupon, T. C. Tollison, a witness sworn in behalf of the City of Opelika, testified substantially as follows:

My name is T. C. Tollison; I am City Clerk of the City of Opelika, and as such am custodian of the City's minutes and ordinance books. The book now presented to me is the City ordinance book or minute book. In this book on the page headed "City License Schedule for 1939" and the [fol. 30] subsequent pages is an ordinance and that ordinance was adopted by the Board of Commissioners of the City of Opelika for the year 1939, and was in effect from January 1st, 1939, up to the present time; that is the original ordinance in that minute book. This license schedule which has the certificate affixed of myself as the City Clerk is a correct and exact copy of that said license schedule.

The plaintiff, City of Opelika, thereupon introduced in evidence the original ordinance identified by the witness, requesting and securing permission of the Court to withdraw the minute book and substitute in lieu thereof the City License Schedule identified by the witness, the same being in words and figures as follows, to-wit:

(Here the Clerk will set out the Exhibit referred to.)

EXHIBIT

City License Schedule for 1939

An ordinance to fix and prescribe the rates for license or privilege taxes for trades, vocations, professions, and other businesses conducted within the City of Opelika, Alabama, and its police jurisdiction for the year 1939, and to prescribe certain conditions and provisions for the conduct thereof and to further fix and prescribe certain penalties for the violation of said ordinance.

Be it ordained by the Board of Commissioners of the City of Opelika, Alabama, that the following schedule of rates for license or privilege taxes for the conduct of any trade, vocation, profession or other business conducted within the City of Opelika and its police jurisdiction for the year beginning January 1, 1939, and ending December 31, 1939 and the following conditions and provisions for the conduct thereof, and the following penalties for the violation thereof be and it is hereby adopted, to-wit:

Conditions and Provisions

1. Right of City to Revoke.

All licenses, permits or other grants to carry on any business, trade, vocation, or professions for which a charge is made by the City shall be subject to revocation in the discretion of the City Commission, with or without notice to the licensee.

2. License for Portion of Year.

In case such license be taken out after July 1, only one- [fol. 31] half of such license shall be charged and collected, unless otherwise provided therein.

3. Transfer of License.

No license, permit, or other grant to carry on any business, trade, vocation, or profession issued under this ordinance, shall be transferred from one person to another, nor transferred from one location to another.

4. Penalties.

It shall be unlawful for any person, firm, or corporation or agent of such person, firm or corporation, to engage in any of the businesses or vocations for which a license may be required without first having procured a license therefor, and any violation hereof shall constitute a criminal offense, and shall be punishable by fine not to exceed one hundred (\$100.00) Dollars for each offense and by imprisonment not to exceed thirty days, either or both at the discretion of the Court trying the same, and each day when such business or vocation is conducted without such license shall constitute a separate offense.

5. Lien for License.

On all property, both real and personal, used in any exhibition, vocation, profession or business, for which a license is or may be required, the City of Opelika shall have a lien for such license, which lien shall attach as of the date the license is due, on all property of or used in such exhibition, vocation, business, or profession, which lien shall be superior to all other liens except the lien of the State, County, and City for taxes, and of the State and County for licenses,

and which lien may be enforced as other liens are enforced by attachment or equity.

6. License for Police Jurisdiction.

All vocations or businesses or exhibitions located or operated without the City Limits but within the police jurisdiction and delivering goods within the City shall pay the same license for such vocation, exhibitions or profession as is imposed upon similar vocations, businesses or exhibitions, within the City Limits.

7. Police Jurisdiction.

All vocations, exhibitions, professions, or businesses except those described in Section 6 hereof, located outside the City Limits but within the police jurisdiction, shall pay one-half the amount of the license imposed upon similar vocations, exhibitions, professions or businesses within the City Limits proper.

8. Sidewalk or Street Stands.

No license shall be issued to any bootblack, news stand, popcorn stand, weiner stand, or any other similar stand for the sale of any product where said stand proposes to locate on any street, alley or sidewalk of the City unless written permission be granted by the City Commission of the City of Opelika.

9. Persons Engaged In Two or More Vocations.

All trades or vocations dealing in two or more of the articles or engaged in two or more of the trades or vocations for which licenses are required by the City, shall pay for and take out licenses for each line of business, calling or vocation.

10. License Dependent on Capital or Income.

In all cases where the amount to be paid for the license depends upon the capital invested, or the value of the goods, or the amount of sales, receipts, or income the applicant for such license shall file with the City Clerk, as a condition precedent to the issue of such license, a sworn statement of such capital, sales receipt or income together with such other and further proof as the City Clerk shall request.

and the failure of the applicant to comply with this provision [fol. 32] shall subject such applicant to the penalties prescribed in Condition 4 (Penalties) hereinabove set out, of this license ordinance.

11. False Affidavits.

It shall be unlawful for any applicant to knowingly and willfully make and file with the City Clerk any false written affidavit or false oral representation as to the amount of stock on hand or volume of gross receipts, revenue or businesses or capital invested therein or any other material information concerning the same as to any business or vocation for which license is required by the City, and a violation of this section shall subject the guilty person to the penalties provided in Condition 4 (Penalties) of this license ordinance.

12. Vocations Not Specified Herein.

Any applicant desiring to conduct any business or vocation other than those specified in this license ordinance shall make application to the President of the Commission, who shall thereon fix a reasonable license for such business or vocation and instruct the Clerk as to the amount so fixed.

13. Beginning Business After July 1.

Persons, firms, or corporations beginning any vocation or business for which licenses are required in this ordinance in the City or in its police jurisdiction after July 1, 1939, shall pay such license on or before the day such business or vocation is actually begun as a condition precedent to the right to do business or engage in such vocation.

14. Delinquent License.

All licenses will become delinquent after the fifteenth day of February 1939, and an amount equal to 10% of the amount of such license will be added as a penalty, after said date; and all persons, firms, or corporations doing business after said date without proper license will be subject to arrest.

A

Abstract to Title Companies (Annual Only)	\$10.00
Architects (Annual Only)	15.00
Auctioneers (Annual Only)	25.00

Automobiles

Dealers in automobiles alone	25.00
Repairs	
1. No help employed (one man shop)	15.00
2. Two or three employees	25.00
3. Four or more employees	35.00
4. Connection with dealers	15.00
Paint Shop	
1. Each person, firm, or corporation	25.00
2. Connection with other license	15.00
Top Repairing, Covering, Upholster	
1. Alone	25.00
2. Connection with other license	10.00
Vulcanizing or Retreading	15.00
Accessories	
1. Alone	25.00
2. In connection with other license	10.00
Second Hand Car Lot	
1. Alone	25.00
2. In connection with and as a dealer	Nothing
Storage	
1. Alone, principal business	10.00
2. In connection with other business for which automobile license is required	5.00
Automobile Composite License	50.00
Adding Machines, Cash Registers and Type-writers	
Dealers in (Annual Only)	10.00
[fol. 33] Advertising (Commercial) (Annual Only)	
1. Bill poster or distributor of advertising matter Per day	\$2.00
Per Year	25.00
2. Bill boards, each person or firm using, leasing or supplying billboards for advertising purposes	25.00
3. Sign Painters	5.00
4. Vehicle on streets or sidewalks as an instrument for advertising, same being subject to the approval of the City Commission, who reserve the right to revoke this license at any time that they deem proper with or without notice, and without refund of any license paid therefor	
One vehicle	25.00
Per week, one vehicle	10.00

Agents (Annual Only)

Book Agents (Bibles excepted)	10.00
Labor agents	100.00
Musical Agents	25.00
Negotiating Loans on real estate	25.00
Claims or collection agencies	25.00
Transient or itinerant agents selling rugs, antiques, goods, wares, merchandise or taking orders for same	25.00
Transient agents for wearing apparel	10.00

B

Barber Shops—One chair	5.00
Each additional chair whether in use or not	2.50
Barbers	
For each person not having shop but doing barber work	5.00
Beauty Parlors	10.00
Each operator additional or student	2.50
Bakeries	25.00
Itinerant or transient bakers, dealers, trades or distributors of bread	75.00
Bagatelle or Jenny Lind Table (Annual Only)	100.00
Bicycle exchange or repair shop (Annual Only)	5.00
Bottlers	25.00
Transient or itinerant dealers in soft drinks	25.00
Bootblack Stands	5.00
(Not required of barber shops)	
Bowling Alleys (Annual Only)	25.00
Building and Loan Associations (Annual Only)	25.00
Bus Stations—Passenger (Annual Only)	50.00
Bus or Truck Stations Operating In City	50.00
(Does not apply to Motor Vehicles operated by railroads and using railroad depots)	
Brokers or Commission Merchants (Annual Only)	15.00
Brick Yards (Annual Only)	25.00
Blacksmiths	5.00
Boarding or Rooming Houses, 10 or more boarders	10.00
Brokers Selling Fruits, Melons From Cars, per car (Annual Only)	5.00
Building Permits	1.00

Bankrupt Sales (Annual Only)

Each person, firm or corporation selling bankrupt, fire or water damaged stock or merchandise where such stock or any or any part thereof has been shipped into City after such bankruptcy or damage in addition to other license required by law, per day 100.00

Where bankrupt or damages stock was located in City of such bankruptcy, or damage, in addition to other license required by law, per week 5.00

C

Cabinet Makers (Annual Only) 10.00

Candy Makers (Annual Only) 10.00

[fol. 34] Candy—Transient or Itinerant Distributors of Candy, Confection, Peanuts or Peanut Products to Merchants or at Wholesale (Annual Only) \$25.00

Cattle—Dealers in (Annual Only) 15.00

Cigarettes

Retail Dealers 10.00

Wholesale Dealers 25.00

Vending Machines 4.00

Coal Dealers (Annual Only) 15.00

Commissaries or Grub Cars (Annual Only) 100.00

Contractors (building or construction) (Annual Only) 20.00

In brick, cement, or plastering 10.00

Subcontractors 10.00

Cotton Buyers (Annual Only) 50.00

Cotton Seed Oil Mills (Annual Only) 75.00

Cotton Gins (Annual Only) 30.00

Cotton Warehouses (Annual Only) 50.00

Cotton Seed Buyers (Annual Only) 25.00

Clothing or Shoes—Second hand dealers (Annual Only) 25.00

Cartridges, pistol or rifle (Annual Only) 15.00

(In addition to merchandise or other license)

D

Dye House (Annual Only) 25.00

Detective Agencies (Annual Only) 25.00

Dealers in Produce Only (Annual Only)	20.00
Drays (Annual Only)	
One horse	5.00
Two horse	10.00
Druggists	See Mercantile
Dry Cleaners and Pressers (Annual Only)	15.00
Dance Halls—Public (Annual Only)	
Public dance hall where music is furnished by mechanical instruments such as radios, player-pianos, phonographs, or other like instruments either free or operated by coin in the slot	25.00
All other dance halls	50.00
(No license to be granted except upon written petition and investigation by Commission)	

E

Engineers, Civil (Annual Only)	10.00
Express Offices (Annual Only)	125.00
Electrical Contractors and Dealers in Electrical Supplies (Annual Only)	25.00
Electrical contractors not dealers in such supplies	15.00
(No contractor do electrical work without first obtaining license and consent of City Light Department; all wires to be erected as prescribed by said department according to S. E. Underwriters Code.)	

F

Fertilizer Manufacturer or Mixer (Annual Only)	50.00
Fertilizer Dealer—Alone or agent (Annual Only)	15.00
(Not included in merchants.)	
Florists or Nurseries (Annual Only)	25.00
Fortune Tellers or Gypsies (Annual Only)	100.00
Fruit Dealers or Peddlers From Wagons or Trucks	
Except farmers selling produce from own farms (Annual Only)	25.00
Fruit Stands	15.00
Fish—Dealers in fish or oysters alone (Annual Only)	15.00
Furniture Dealers	See Merchants

G

Gas, Electric Light or Power Companies or Heat-
[fol. 35] ing Companies Furnishing Power or
Electricity Within City of Opelika (Annual Only)

Two Percentum of its gross income in munici-
pality of Opelika, Alabama.

Gasoline—Dealers in Gasoline, Oils, or Gasoline
Products and Their Agents, Wholesale (Annual
Only)

\$100.00

Retail dealers in gasoline, oils, or gasoline
products, each pump, whether in use or not

5.00

Retail or wholesale dealers in motor oil only

100.00

Golf Course, miniature (Annual Only)

15.00

Groceries

See Merchants

Grain, Feed and Seed Dealers (Annual Only)

25.00

(Or Merchandise License)

Gun Shops or Gun Repairs Shops (Annual Only)

5.00

H

Hair Dressers (Colored) (Annual Only)

5.00

Hand Organs or Strolling Musical Bands (Annual
Only)

5.00

Hardware

See Merchants

Hats, blocking, cleaning (holding no other license)
(Annual Only)

15.00

Hatcheries (Annual Only)

10.00

Hides—Dealers in (Annual Only)

10.00

Hides—Dealers in connection with meat market or
other business (Annual Only)

5.00

Hotels (Annual Only)

Less than 20 rooms

10.00

Over 20 and less than 30 rooms

25.00

Over 30 and less than 50 rooms

50.00

(This does not include the right to operate
cafes, barber shops, newsstands, or sell ciga-
rettes or other line of business without addi-
tional license.)

House Movers (Annual Only)

10.00

I

Ice Dealers—Retail (Annual Only)

75.00

Ice Cream Manufacturers, Ice Cream Products
Plant Doing Wholesale or Retail Business at
One Location and/or Distributors (Annual Only)

35.00

Each additional location

5.00

Ice Cream Parlors (Annual Only)

When ice cream is sold or distributed as the principal item of business 35.00

Ice Cream Peddlers (only wrapped goods) (Annual Only) 10.00

Insurance (Annual Only)

Sec. 1. For each person, firm or corporation doing a fire or marine insurance business in the City of Opelika, shall pay an annual license tax of \$4.00 on each \$100.00 or major fraction thereof of the gross premiums on policies issued for the preceding calendar year, or police jurisdiction thereof, less premiums returned by cancellation. Provided that each person, firm, or corporation doing a fire or marine insurance business which has not done business during preceding year in the City of Opelika, shall pay a license of \$500.00 in advance, and there shall be an adjustment at the expiration of a year on such license according to the schedule hereinabove specified;

Sec. 2. Each person, firm, or corporation doing any other kind of insurance business than those specified in Section 1, and mutual aid association shall pay an annual license tax of \$15.00 and \$1.00 on each \$100.00, or major fraction thereof of the gross premiums less premiums returned by cancellation received during the preceding year on policies issued during the preceding year in the City of Opelika, and police jurisdiction thereof;

Sec. 3. Persons, firms, or corporations doing what is known as a mutual business or paying sick, accident or death benefits within [fol. 36] the City of Opelika or police jurisdiction thereof, shall pay an annual license tax of \$15.00;

Sec. 4. Each person, firm or corporation doing an insurance business within the City of Opelika or police jurisdiction thereof shall, within sixty days after adoption of this license schedule and within sixty days after the first day of January in each succeeding

year, furnish to the Commission of the City of Opelika, in writing, a duly certified statement showing the full and true amount of gross premiums received during the preceding calendar year on policies issued to citizens of Opelika or police jurisdiction thereof; provided this license shall not apply to Knights of Pythias, Odd Fellows, and such other incorporated fraternal orders.

Implements, agricultural See Merchants

J

Junk—Dealers in Junk, scrap iron or scrap automobiles (Annual Only) \$25.00
Jewelers (Annual Only) See Merchants

L

Laundry (Annual Only) 25.00
Dry Cleaning in connection therewith 10.00
Itinerant Laundries 75.00
Itinerant Dry Cleaners 50.00
Lectures, where admission is charged, per day 10.00
Lightning Rod Salesman (Annual Only) 100.00
Liquor or Beverage (Annual Only)

(All liquor and beer licenses delinquent after January 2, 1939.)

Wholesale Malt or Brewed Beverage License 200.00
Hotel Liquor License 150.00
Restaurant Liquor Licenses 150.00
Club Liquor Licenses 200.00
Retailer of Malt or Brewed Beverages 5.00

Lumber—Dealers in brick lime, cement, or other building material, not engaged in the manufacture of such building materials, or blinds, sash, etc. (Annual Only) 10.00

M

Manufacturers—Of cigars, cigarettes (Annual Only) 25.00

Manufacturers—Of overalls (Annual Only) 25.00

Merchants—Merchandise license does not include items of licenses, especially mentioned and otherwise licensed, special items are in addition to the general merchandise license.

Where stock is \$1000.00 or less 5.00

Where stock is over \$1000.00 and less than \$2000.00	7.50
Where stock is over \$2000.00 and less than \$3000.00	10.00
Where stock is over \$3000.00 and less than \$5000.00	15.00
Where stock is over \$5000.00 and less than \$10,000.00	25.00
Where stock is over \$10,000.00	35.00

All persons taking out mercantile license shall be required to make affidavit before the City Clerk to the value of the stock carried by them, and before issuing such license the City Clerk is required to read the following questions to such applicant, who shall be required to answer same under oath:

1. Name of business or concern.
2. Name of person making application.
3. When was inventory last taken of stock on hand.
4. What was the total value of stock at the time of making said inventory.
5. Give the amount of State and County assessment of said stock for 1938.
6. Give total amount of fire insurance carried on Jan. 1, 1938 on such stock.
- [fol. 37] 7. Give value of said stock of goods now on hand.
8. Average stock carried.

Mattress Manufacturer or Renovator (Annual Only)	\$10.00
Merchant Tailor (Annual Only)	20.00
Machine Shop (Annual Only)	10.00
Music Machines (Annual Only)	
Where operated in connection with other business	2.50
Where not operated in connection with other business	10.00

Marble Yards (Annual Only)	10.00
Meat Markets (including fish and oysters) (Annual Only)	30.00
Mills	
Corn	10.00
Flour	10.00

N

Newspapers—Daily, weekly, monthly, or periodical newspapers, or similar publications (Annual Only)	50.00
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P

Professions—Attorneys at Law, Physicians, Dentists, Osteopaths, Optician, Occult, Chiropractor, or Any Other Profession, Not Here Enumerated and where doing business as a firm, for each individual member thereof (Annual Only)	15.00
Periodicals—Dealers or newsstands selling or distributing (Annual Only)	5.00
Paper Hangers and Decorators (Annual Only)	5.00
Pawn Brokers or agents (Annual Only)	150.00
Painters (contractors) (Annual Only)	5.00
Peddlers, or itinerant dealers, distributors or salesmen not otherwise included in this schedule (Annual Only)	75.00
Peanut or Popcorn Stands (Annual Only)	5.00
Photograph or Art Galleries (Annual Only)	
Where principal place of business has within the City of Opelika, for more than six months immediately prior thereto	10.00
Itinerant or transient photographer, picture or view taker, coupon salesman for pictures or photographers, enlargements, solicitors or canvassers for same	15.00
Piano Tuners (Annual Only)	10.00
Plumbers, Gas Fitters (Annual Only)	25.00
Printers, Job Printers (Annual Only)	
Two presses or less	10.00
Additional presses, per press	5.00
Pool Room (Six months only)	200.00
Punch Boards—each board (Annual Only)	1.00

R

Railroads, having offices in or running freight or passenger cars to Opelika (Annual Only)	175.00
Rádios, Mechanical Refrigerators	
Dealers in, alone	25.00
In connection with other licensed business	10.00
Radio Repairs (Annual Only)	10.00
Real Estate Agents (Annual Only)	25.00
Restaurants	
Each restaurant, 5 tables or less	33.50
Each restaurant, 6 tables or more	50.00
(4 counter stools equal one table)	
Each lunch or hot dog stand, no stools or tables	15.00
Each tea room same schedule as Restaurants.	
Drug Stores serving regular meals, same schedule as restaurants.	
Peddlers of hot dogs, hamburgers or hot tamales	5.00

S

Saw Mills (Annual Only)	25.00
[fol. 38] Stores Dealing in Second Hand Furniture or Other Second Hand Goods (Annual Only)	\$25.00
Sewing Machines—Dealers in (Annual Only)	15.00
(This does not apply to merchants now carrying same in stock and paying mercantile license otherwise.)	
Scales (Annual Only)	
Each automatic coil weighing scales for public use	1.00
Shoe Makers or Repairers (Annual Only)	10.00
Where no machinery	5.00
Shooting Galleries (Annual Only)	5.00
Spiritualists, or persons claiming to give special treatment for the cure of physical, mental or spiritual ailments, or Phrenologist (Annual Only)	100.00
Soft Drinks, retail where not in connection with other licensed business	5.00
Shows:	
Carnival or Street Fairs,	
For each place where said street fair is conducted, and for a duration not exceeding two weeks	
Not more than 10 Exhibitions	150.00

Where more than 10 Exhibitions 200.00
 (When operated under auspices of
 local authorities in discretion of
 Commission.)

Circus,

Each person operating circus, for each exhibition where seating capacity is:

Less than 2000, per day 50.00

2000 or more, per day 100.00

For each side show or exhibition accompanying such circus, per day 10.00

Concerts,

Musical entertainments and/or public lecture, when charges are made for admission, not given wholly for charity, school or religious purposes, per day 10.00

Dog or Pony Shows,

Where admission is charged shall be considered a circus and shall pay one-half licenses required for circus.

(Shall not apply to athletic or other School exhibitions.)

Menagerie, Museum,

For each menagerie, or museum where not in connection with circus 250.00

Merry Go Round, Flying Jenny, Rollercoaster, or other device of like character (in each place where operated whether incorporated or not)

Per annum 50.00

Per month 20.00

Per day 10.00

Motion picture Shows, per annum 175.00

Motion picture Shows (transient) (Payable weekly in advance)

First week 50.00

Each week thereafter 25.00

Theatrical Shows, vaudeville, varsity shows, or exhibitions or performances to which admission is charged

Per day 10.00

Per week 25.00

Soda Fountains or Confectionary Parlors (Annual Only)

Principal business	25.00
Soda fountains in drug stores or other businesses where licenses amount to \$25.00	Nothing
Sign Painting (Annual Only)	5.00
Skating Rinks, per week	10.00
Slot Machines, Automatic Vending Machines, or similar devices receiving coin in connection with sale or enjoyment of property or electric current, where otherwise legal, each machine (annual only)	25.00
(Not construed to license unlawful machines or devices.)	
Stables—Livery, or persons selling, feeding or keeping horses, mules, carriages, buggies, or other vehicles for hire, not to include drays or wagons hauling in competition with licensed drays or trucks (Annual Only)	25.00
[fol. 39] Stables—Itinerant or transient mule dealers, engaged in business of selling livestock at auction, or making sales otherwise (Annual Only)	\$200.00
Stables—Horse or mule dealers (Annual Only)	25.00
Suppers—Where charge is made and proceeds not exclusively devoted to charity or religious purposes (Annual Only)	1.00

T

Tailors (Annual Only)	20.00
Itinerant or transient tailors or persons taking orders for suits or delivering same	75.00
Trucks, hauling or carrying or transporting freight baggage or packages (Annual Only)	See Taxicabs
Taxicabs—persons, firms or corporations operating motor vehicles, commonly known as taxicabs, shall pay the following licenses for each vehicles:	
Not exceeding over 2400 lbs. in weight	5.70
Weighing over 2500 lbs. but not exceeding 3000 lbs.	8.40
Weighing over 3000 lbs. but not exceeding 3500 lbs.	9.65
Weighing over 3500 lbs. but not exceeding 4000 lbs.	13.15
Weighing in excess of 4000 lbs.	15.00

No person or firm shall operate taxicabs or trucks in the City of Opelika or its police jurisdiction, carrying passengers for hire, unless each vehicle is protected by public liability insurance policy issued by a solvent insurance company carrying liability insurance within the following limits:

Person liability and bodily injury to one person \$5000.00 with a personal liability limit of \$10,000.00 or over; and \$5000.00 property damage in any one accident, except property of the assured. Not required that such coverage shall apply to assured's employee or employees engaged in operating such taxi at the time of the accident. Said policy shall include an endorsement that it shall not be cancelled without notice of cancellation served upon the City Clerk of Opelika at least five days prior to cancellation. No license shall be issued until such insurance policy is presented to the City Clerk before the issuance of such license.

Or, shall have an agreement in writing with the City of Opelika to pay all final Judgments recoverable against such applicant and/or driver of the taxicab arising out of their operation, and shall also deposit with the City of Opelika, where the application is for a permit to operate five or less taxicabs, \$2500.00, and the sum of \$500.00 for each additional taxicab over five which a permit is sought. Such deposit may be made by paying monthly the sum of \$25.00 for each taxicab for which permit is sought, the first payment to be made before the permit is granted and each succeeding payment made not later than the 5th of the following month, such monthly payments to be continued in such manner until the full amount of the required deposit is paid.

Taxicab Driver's License	2.00
Telegraph Companies (Annual Only)	50.00
Telephone Companies (Annual Only)	100.00

Tin Shops	15.00
Itinerant or transient tanners or roofers	25.00
Transient or Itinerant Dealers in Toilet Articles (Annual Only)	100.00
Transient or Itinerant Vendors or Patent Medicines or Doctors (Annual Only)	150.00
Transient or Itinerant Opticians (Annual Only)	75.00
Transient Agents or Dealers or Distributors or Books (Annual Only)	5.00
Transient Dealers	25.00
(Not covered heretofore in this schedule, defi- nition same as transient dealer.)	

U

Undertakers (Annual Only)	25.00
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[fol. 40] v

Veterinary Surgeons (Annual Only)	\$15.00
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W

Watchmakers or Repairers. (Annual Only)	10.00
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Transient or itinerant repairers of watches, stoves, or phonographs	15.00
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Welders (Annual Only)

Alone	10.00
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Used in connection with machine shops Nothing

Wood Yard	10.00
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There will be an issuance fee of \$0.50 added to and collected on each license.

Should any section, condition, or provision or any rate or amount scheduled as against any particular occupation exhibited in the foregoing schedule be held void or invalid, such invalidity shall not affect any other section, rate or provision of this license schedule.

Adopted and approved at a regular meeting of the City Commission of Opelika, Alabama, on December 13, 1938.

(Signed) Jno. S. Crossley, President of City Commission.

I, T. C. Tollison, City Clerk, certify that the foregoing ordinance is a true and correct copy of the original license schedule ordinance adopted by the City Commission of the

City of Opelika, Alabama, in open meeting at regular meeting thereof held on December 13, 1938.

Given under my hand, this 24 day of December, 1938.

(Signed) T. C. Tollison, City Clerk.

[fol. 41] • Testimony of O. B. Broadwater

Whereupon, O. B. BROADWATER, a witness sworn in behalf of the plaintiff City of Opelika, testified substantially as follows:

My name is O. B. Broadwater; I am a policeman of the City of Opelika and have been around 3 years; I was a City policeman in April of this year, and at that time arrested the defendant Roscoe Jones on Eighth Street in front of Fisher's, this side of the picture show. At the time Roscoe Jones had these booklets or pamphlets here exhibited to me or booklets or pamphlets similar to those; I mean they appeared to be the same as those.

Thereupon, counsel for defendant stated: "If he intends to introduce those as evidence we desire to object on the ground that he was arrested without a warrant and that any evidence that might have been delivered to the witness by the defendant would be incompetent."

The witness further testified substantially: I was there when the defendant was on the streets of Opelika with these books or pamphlets, and there is no question about it having been this defendant and books similar to these, two different types of books, one entitled "Face the facts and learn the only way to escape", and the other "Facism or freedom". The defendant was walking on the sidewalk, holding the books in his hand up that way, offering them for sale. I arrested him. He was holding the books up; he may have had some more books in the other hand. I heard the defendant make a statement about it in court later on; I did not at the time nor did any one in my presence as I know of make any threats against him or hold out any hope of reward to him or offer him any inducement to make a statement.

"Q. What did he say?"

"Mr. Powell: I would like to register a similar objection to any statement of that kind because the defendant was arrested without a warrant: the same objection."

"The Court: All right."

"A. He said that he made this stand here and fixed this thing and put it around there on 9th Street."

The stand indicated by witness, is an upright piece of timber, braced at the bottom to keep it erect and cross-[fol. 42] pieced or boxed at the top, 5 to 6 feet high.

The witness further testified substantially: I did not get this stand myself; Chief of Police Heath got it; I saw it though on Ninth Street; at that time it was as it is now and this is the way both sides were at that time; it had another one of these green books at the top; that is the condition it was in; it was on the streets of Opelika, just off the pavement. The wording on that sign was "Get your 2 copies, only 5 cents", the same as it is now on both sides. We brought the stand in and placed the defendant in jail. The books the defendant had in his hand at the time were similar to these shown to me here and the same as those up there on the stand.

Thereupon, the plaintiff City of Opelika offered in evidence the books and the stand identified by the witness.

On cross examination said witness O. B. Broadwater, testified substantially: I don't know as I told the defendant anything when I arrested him; I asked him if he had — license; he said he didn't have any license; I said "Well, you are violating a City ordinance. I will have to carry you down." I did not say anything else. I then carried him down, turned him over to the Chief and locked him up; I turned him over to the Chief at the jail; I put the defendant in jail myself; the Chief was there. What I have stated is all that I said to defendant; as to whether I told the defendant at all that he was under arrest, I supposed he had sense enough to know that. When the defendant made the statement about the sign we were up in the courtroom. As to how I know defendant made the statement freely and voluntarily, I didn't hear anybody threaten him anywhere; I don't remember how many policemen were standing around at the time; I was there; as well as I remember the Chief of Police was there; I am not sure he was; there were several around; I just don't recall just who were there. As to whether I am right sure anybody else was there than myself and the Chief; I said they were there; I am not positive just who was there but I remember that some others were there; if I am not mistaken Mr. Powell, counsel for defendant, was there, but I am not sure about —

"Q. What was the defendant's religion? Do you know what his religion is? A. No, sir. I don't know.

[fol. 43] "Mr. Duke: We object to what his religion is.

"The Court: I sustain the objection to the question. His religious belief is not involved.

"Mr. Powell: May it please the Court, we think that the question of religion is a very important part of the case, not only that he may be exempt from the provisions of the ordinance, the operation of the ordinance, on the ground of freedom of speech and press, but the same constitution makes exemption on the ground of freedom of religion.

"The Court: You can state to the reporter what you expect to prove. I do not see that the matter of religion is involved in the question of the violation of this ordinance. But, if you desire to offer evidence along that line state to the reporter what you desire to show by this witness if you can show it.

"Mr. Powell: We hope to show that this defendant was a regularly ordained minister of the Gospel, and that his activity at the time in question was in furtherance of his work as such minister, and that this is an effort to interfere with his right to worship and with that religious activity at that time.

"The Court: Well, I will sustain an objection to that testimony, I don't think—

"Mr. Powell: Note an exception.

"The Court: —it applies in this case.

"Mr. Powell: That is all."

On redirect examination said witness O. B. Broadwater testified substantially: I knew the defendant at the time referred to; I don't know personally where he lived, but he told me that he lived in Auburn; this happened in Opelika.

On recross examination said witness testified substantially: I have examined these booklets; I haven't taken them off of that stand; the board is in the same condition now that it was when taken; as to whether there was a booklet on the corner of the board you refer to, there might have been; I did not take it off; I wouldn't say whether there was one there or not; as to whether it is gone now, I don't know about that; it could not have been on there; it could have [fol. 44] been turned the other way. As to which of the two

books I have examined, I looked at both of them; I looked at them around at the stand where Thelma was (referring to wife of defendant) and also where the defendant was.

"Q. Did you notice this little thing here?

"Mr. Duke: We object. What is contained has no bearing whatever.

"A. No, ~~say~~ I didn't read it. I didn't read either one of them.

"The Court: It is not a question of the contents. It is not a question of whether it is a book or not, but whether this man was selling them in violation of the ordinance.

"Mr. Powell: If only freedom of the press was involved we would agree that would be the case. But if it involved another question of freedom of religion—

"The Court: I have not heard any testimony to the effect that this man was worshipping or exercising religious freedom there. That he just merely offered books for sale. If he was selling First Readers it would be the same thing.

"Mr. Powell: We will pass that for the present.

"The Court: The contents of the book are not in issue."

Queried by the Court the witness testified further substantially: As to whether I heard the defendant offer any of these books for sale, I saw him offer them for sale in his hand this way; the first place I saw him was coming up Avenue A; I didn't hear him say anything; I couldn't understand what he was saying; he was holding these books up there over the top of his head over the crowd; I went around the block and met him; he come up to the corner and crossed Avenue A and was going down Eighth Street, and he still had those books in his hand; he said, get 2 copies for 5 cents; as to whether he said "You can get 2 copies for 5 cents", I don't recall exactly the words; it was substantially that.

On recross examination being resumed, the witness testified substantially: As to how far I was from him there, I was about the middle of the street; I said the first time I saw him coming up Avenue A I wasn't noticing what he said. It is not the fact that I got that information about 2 copies from the sign; the fact is just what I told you; the [fol. 45] sign wasn't with the defendant at the time; the sign was on Ninth Street and I arrested the defendant on Eighth Street a block away; I saw the sign before I arrested

him. No, what the sign said is not all that I knew about it; I knew what I told you about it; I heard defendant offer those 2 copies for 5 cents; as to whether I first stated I did not hear defendant distinctly, I said I didn't understand him the first time I saw him. I am not wrong in what I testify now. As to whether I am wrong if the reporter has down my testimony that I did not understand just what defendant did say, the first time I saw the defendant on Avenue A I didn't arrest him then; when I first saw defendant I didn't understand just what he was saying; I did understand what he was saying the second time I saw him when I arrested him in front of Fisher's on Eighth Street.

"Mr. Powell: Just to refresh his recollection I would like to ask the reporter to refer back to the testimony in which he said that he didn't hear him, didn't know that he heard him say anything."

The testimony was then read as follows:

"The Court (To the witness): Did you hear this man offer any of those books for sale?

"A. I saw him offer them for sale in his hand this way, (Indicating). The first place I saw him coming up Avenue A.

"The Court: What did he say?

"A. I didn't hear him say anything. I couldn't understand what he was saying. He was holding those books up there over the top of his head over the crowd. I went around the block and met him. He come up the street and crossed Avenue A and was going down Eighth Street and he still had those books in his hand. He said, get two copies for 5 cents.

"The Court: He said, "You can get two copies for 5 cents"?"

"A. I don't recall exactly the words.

"The Court: Was it substantially that?

"A. Yes, sir."

Thereupon,

Mr. Powell: I would like to object to the statement that he offered them for sale as being merely a conclusion.

"Mr. Duke: I wish to call the Court's attention to the [fol. 46] fact that the witness said that he saw the man on Avenue A.

"The Court: I remember what he said, all of that.

"Mr. Powell: That is all."

On redirect examination said witness O. B. Broadwater testified substantially: I first saw the defendant on Avenue A, and at that time did not understand what he said; I saw the 2 books in his hand at that time; I then went around the block and met defendant going down Eighth Street; and at that time I heard what he said; I don't swear to exactly the words he said, but he had these pamphlets over his head and I understood him to say "2 copies for 5 cents"; that was after I went around the block; as I went around the block I left the Chief of Police on Ninth Street; the sign was on 9th Street; I met the defendant then on 8th Street. As to what connection defendant had with the sign, his wife was at the sign selling those pamphlets; offering them for sale, and I just heard the defendant make the statement in the City room later on that he had made that sign and placed it around there for her; I think at the time defendant made that statement the court was going on and that was the occasion in the City Recorder's Court; I am not positive whether Mr. John Crossley was there or not; I believe that Mr. Powell, counsel for defendant, was there; I am not positive about that; I just don't recall exactly who was there; there were several there.

On recross examination said witness testified substantially: It is not a fact that the statement he made was that he made the sign but didn't place it there; he said he placed it there, I don't remember that the words he used were that he made the sign but that he did not place it there; he didn't make that statement in my presence and your presence, but I understood him to say that he made the sign and placed it around there for her.

The plaintiff the City of Opelika here rested.

[fol. 47]

Testimony of Roscoe Jones

Whereupon, ROSCOE JONES, the defendant sworn in his own behalf, testified substantially: My full name is Roscoe Jones; I am a minister of the Gospel; I live now at 1101 Glade Road in Columbus, Ga. I moved to Columbus, Ga., in August. Prior to that I resided over here in what they call the planing mill field in Opelika, and then I resided

in Auburn. I lived here in this county from October until August; I came here the 1st day of October, 1938, and stayed until August, 1939. While here in this county I was engaged in preaching the Gospel of the Kingdom, and was engaged in no other kind of work.

"Q. Just explain to the Court how you worked in preaching the Gospel?

"Mr. Duke: We object to such a broad question as that.

"The Court: I sustain the objection to that question. I don't want to go into matters of common ethics here if I can help it. The question is not, as the Court sees it, a question of religion or the freedom of religion or the right to preach his religion; but purely a question of whether this man was selling books and offering them for sale on the streets of Opelika. I am going to try to hold the testimony to that issue.

"Mr. Powell: We would like to get in the record—

"The Court: Yes. You can state to the reporter what you expect him to say in answer to your question. That is our practice here in this State. It is possible you are not familiar with it as resident attorneys are. I don't know whether you have that practice in Georgia. I am not familiar with the practice over there. Here you ask a question and if the Court sustains the objection to it here you have the right for the benefit of your objection to state to the reporter what you expect the answer of the witness to be, to get it in the record.

"Mr. Powell: Well, I would like to ask him some questions regarding his work which I think would help to identify him to the Court and would help the Court to understand.

"The Court: He stated that he is a minister of the Gospel [fol. 48] and was at the time this occurred. That is proper for him to prove that and that is all right. The Court understands and has some idea as to his general character, repute and so on.

"Q. Do you conduct Bible studies?

"Mr. Duke: We object.

"The Court: I will let him answer that.

"A. Yes, sir, I do. Different places.

"Q. And then do you use any other means of bringing your Christian belief to the attention of others?

"A. Yes, sir. We use books and booklets and pamphlets and tracts, many different means.

"Q. Did you use any other methods?

"A. Yes, sir, phonograph records, etc.

"Q. What did the phonograph records contain?

"A. The subject of "Fact the Facts", -Fa-cism or Freedom", and religion and Christianity, etc.

"Q. Are they documents pertaining to the scriptures?

"A. Yes, sir.

"Q. Used for the purpose of promulgating Christian belief?

"A. Yes, sir, appealing to the people.

"The Court: I understand that you object to this?

"Mr. Duke: Yes, sir.

"The Court: Go ahead..

"Mr. Powell: If the Court sustains the objections I will be glad to state—

"The Court: I am going to exclude that upon the proper motion of the City of Opelika because I do not think it pertinent to the issue here. But I wish to be informed as to what you want to prove by the testimony so that I can rule with knowledge.

"Mr. Powell: We hope to show that this defendant is a regularly ordained minister of the Gospel, and that he is duly ordained and commissioned by the Lord and by the organization with which he is connected to carry on this work; and that his entire activity while he was engaged here in the City of Opelika was in the furtherance of his Christian belief and the promulgation of the doctrines and teachings of the Congregation of Jehovah's Witnesses with [fol: 49] which he is connected and that he was doing that at the time he was here in Opelika.

"The Court: Well, I don't know that it is necessary Mr. Powell. You know about your case here and you know the issue that is involved here. I don't think there is any question of religious liberty involved in this. You evidently do. I think it is purely a question of whether this defendant was violating a simple ordinance here that has been in effect for a long time. I do not think that this present defendant here has any more right to sell books on the streets than a person who is not a minister. I do not think that has anything to do with the question of guilt or innocence. I want you to have the right to state your case for the benefit of the record.

"Mr. Powell: I would like to further add to that the fact that this method of preaching the Gospel is one that is a

custom in the City and is practiced by others beside the defendant and that is well known to the authorities of City, and that only the defendant because of the fact that he belongs to this particular faith or belief is singled out and arrested and is subject to fine and imprisonment because of that fact. That was raised in my motion by stating that the application was arbitrarily made by the governing function of the City.

"Mr. Duke: After all of that I believe your Honor has gotten what he wants to prove. We want to make a motion to exclude the answers of the witness to all questions about his religion, etc., that he has answered in order to get it into the record.

"The Court: As evidence it is excluded. That being for the benefit of the record or for any use he desires to make of it hereafter, it is in the record for that purpose.

"Mr. Powell: We desire an exception.

"The Court: I do not think the mere fact that the defendant is a minister of the Gospel is a defense to this charge of selling books without first having obtained a license, from the city."

The defendant then testified further substantially: At the time that Mr. Broadwater arrested me he arrested me [fol. 50] in front of Mr. Hagedorn's. I never told any one that I placed that sign where I saw it; my wife carried that sign there; I didn't have anything to do with it; she went out to the City limits and brought it to town; I am stating what I imagine my wife did; I didn't see her do that. I didn't carry the sign, but they got her there with the sign they said. I went around Avenue A, whatever it is; I was on my way to the post office to get a post card to write my brother in Atlanta, and I heard some one say "Hey"; I didn't know who it was and I kept walking. I had a dozen of those books under my arm, in my hand, out in the open; I didn't have no bag; I heard some one say "Hey you". I looked around. It was a police officer in an automobile. I says "Are you talking to me?" He says, "Yes, I am talking to you. Come here. Get in this car." I said "Am I under arrest?" He said "Yes. You are under arrest." He went around then to the place where the other policeman got my wife and some one told him that the policeman had carried her to police headquarters, and he drove the car around to police headquarters, I hadn't made no attempt to offer any books for sale, but

I had this literature in my hand and it was taken from me at police headquarters by the Chief of Police. I didn't make any sale and Mr. Broadwater didn't hear me offer any one any 2 books for 5 cents. I didn't state in the court room in the presence of the officers and my counsel that I had placed that sign on 9th Street; the lawyer talked there to us and he asked me who made that sign and I told him I did. He asked me did I bring it to this town. I told him I didn't. He asked me where I lived and I told him Auburn. He said "Tell about that sign on the corner". I said, "I don't know. They got my wife. Get her." I wasn't present when they arrested my wife but I was told they arrested her. I just told him what was told to me. I was around in front of Hagedorn's here in the City of Opelika. Mr. Broadwater came down that way and somebody told him "The Chief has taken his wife and gone to the station". When I got there they had her and this sign in the police headquarters.

On cross-examination the defendant Roscoe Jones testified substantially: I made that sign myself and did that writing on it, "Get 2 copies. Only 5 cents"; I wrote that. [fol. 51] As to whether that sign was on the streets of Opelika that day, that's what you all say, I don't know that. I didn't just state that I had just left my wife over on Ninth Street with this sign and gone to the post office; I left the State Liquor Store. The last time I saw my wife before I was arrested I saw her at the State Liquor Store, and that is where I left from to go to the postoffice. She did not have that sign at that time. I didn't make that sign in Opelika, but in a place at the planing mill field at Emma Ragland's house. I didn't leave my wife at the State Liquor Store and go to the postoffice to get a card to write to my brother; that is not the way of it; she left me there and went to get the sign; while she was gone I was waiting for her to come and she stayed so long I left and went to the postoffice. I did the writing on the sign. I was walking up the street in Opelika with a dozen of these booklets under my arm; they were not in a satchel; they were open; I was not offering any of them for sale.

"Q. Did you on that day offer any for sale at any time?

"A. I didn't offer any for sale.

"Mr. Powell: You don't have to answer any question of that kind unless you desire, any question that will have a tendency to incriminate you.

"The Court: That is not the rule in Alabama, Mr. Powell. The defendant goes on the stand in Alabama and makes himself a witness and the opposing party has a right to cross-examine him and he is required to answer.

"Mr. Powell: How about incriminating questions? Does he have to answer them?

"The Court: Yes. He would like any other person who becomes a witness.

"Mr. Powell: I would like to note an exception."

The defendant testified further substantially: I did not on that day offer to sell anybody any of these books, two copies for 5 cents. As to whether at any time during the year 1939, since January 1, 1939, prior to the date of my arrest, I offered to sell books in the City of Opelika to any one in Opelika or distributed them in Opelika, I have worked out little routes around Opelika. As to whether I have ever distributed any of these books in the City of Opelika, I haven't heard any witness say I did; I did not, not as I [fol. 52] remember of. I have not as I remember sold any of them in the City of Opelika or the police jurisdiction thereof which extends 3 miles from the City limits of Opelika, which is 4 miles from this courthouse. I wouldn't swear that I haven't done that but I don't remember it; I will say it like this: I am the man and does the walking; I won't bring my wife into it; in other words, I had the rural part of the territory; my rural route is just as far as Lee County goes; I start outside the City limits where I have my work; I work the Columbus route; as to whether I know where the City limits are, I know where the sign says City limits; it is way down the road by some little colored houses on the left hand side of the road going toward Columbus; that point is approximately a mile from this building, perhaps a little further.

"Q. How far beyond that did you start to distributing this literature and selling it?

"A. Just where the first house is on the outside.

"Q. How about the West Point Road? You have gone that way?

"A. On every road leading out of town I started just outside the city limits and get to work.

"The Court: I think that testimony is incompetent. Mr. Powell, being unfamiliar with our rules of evidence, does not know it. He would have the right to object. I will object for him.

"Mr. Duke: Very well, your Honor.

"Mr. Powell: Thanks, your Honor."

On redirect examination the defendant testified substantially: I am not engaged in the book-selling business anywhere.

Testimony of Stewart Melvin Baker

Whereupon, STEWART MELVIN BAKER, a witness sworn in behalf of defendant, testified substantially: My name is Stewart Melvin Baker; I am a minister of the Gospel, the Methodist denomination.

"Mr. Powell: May it please the Court, what we desire to prove is that they use literature too in connection with the promulgation of their faith in the City and that such is well known to the governing factor and yet there is probably nothing, no objection is made to it. To apply this ordinance [fol. 5?] then to the defendant would be discriminatory.

"The Court: You think then because the City fails in its duty to prosecute Dr. Baker there should be no insistence that it ought to prosecute your client?"

"Mr. Powell: If he was the only one that would not be true; but if that is followed as a rule and the exception is made then I think it would be.

"The Court: With respect to that, Mr. Powell, my thought would be that the prosecuting power should not do that in the State or City, that it should apply the law to all persons alike. That certainly is the theory of our law and our government, that only justice under the law should be administered to all people without regard to their race, color, previous condition of servitude, station in life, or anything at all of that kind. But the mere fact that the City of Opelika, if it be a fact, was not following that and that it failed to prosecute in some instances but was prosecuting in others, would not be a defense to any person for violating the law.

"Mr. Powell: Unless this discrimination was arbitrarily made that probably would be the case; but if it be shown that it is arbitrarily made—

"The Court: If a person was found guilty that might be a matter of appeal to the conscience of the Court with respect to the amount of punishment he would impose,

but it would not be a defense to the charge as a matter of law. Ask the questions and I will rule.

"Mr. Duke: Is it necessary for us to object?"

"The Court: I don't know what the question is going to be yet.

"Q. In your duties as a minister do you use any printed matter?"

"Mr. Duke: We object.

"The Court: Overruled. Let's see what it is."

The witness further testified substantially: We have Sunday school literature. My church is in the City of Opelika. As to whether any of such literature is given to the people of the City of Opelika or distributed to them in [fol. 54] any way, it is at the church. I visit the people in their homes; that is a part of my duties as a minister. As to whether at such times I talked to them about the doctrines and tenets of my faith, no, very little about doctrines; I never do that except in cases of trying to give comfort; that is not the purpose of my visits. I do invite them to church; I usually visit my own members; I don't visit others than the members of my church except by invitation. No, we do not take up collections at the church; we take offerings; as to whether it amounts to the collection of money, it is a voluntary offering; we pass around the usual offering plate; we take their offering if they want to give; if they don't want to there is no pressure; it is an act of worship. In the Sunday School there is a like voluntary offering and there literature is given; it is not sold. As to whether I have ever been arrested for that by the City of Opelika, as far as I know I have not violated the City ordinance; I have not seen any one else arrested for that.

On cross-examination said witness Stewart Melvin Baker testified substantially: I have never sold any church literature of the Methodist church in the City of Opelika. The literature that we use comes through our church; I have never sold it in the City of Opelika; it is paid for by contribution in the church and it is distributed free.

Testimony of Norman McCloud

Whereupon, NORMAN MCCLOUD, a witness sworn in behalf of defendant, testified substantially: I am Pastor of

the First Methodist Church of Opelika. As to whether I understand what is the free exercise of religion, freedom of religion, under the Constitution, that is a pretty big question but I suppose that I understand it about like the average minister. My exercise of religion is carried on in harmony with the Constitutional provision guaranteeing the right to religious belief and practice. As to whether in the course of my work I use printed matter in any way to propagate my faith and belief, we have Christian Advocates, devotional literature and Sunday School quarterlies; I don't know whether we have lesson cards of various kinds [fol. 55] or not for the little children; we have Sunday School literature published I believe in cooperation with several other denominations. In the carrying on of our religious belief and worship we distribute that to the people; some of it is given to the people. As to whether collections are taken from the people to help carry on the general expenses of the church, collections are taken from the different classes in Sunday School; they make up a record every Sunday and they get that turned in as the offering given that day; as to whether we accept that from any one putting an offering into a collection, I don't draw any distinction; it is to pay the expenses incurred in the carrying on of the church work; it covers the free literature, something every month; it is paid for out of these offerings. I consider the literature an essential part of the Christian work, my work as a minister. That distribution of literature takes place in the church. I have no special license to distribute literature in the church. I have not been arrested for that in the City of Opelika nor have I seen any one else arrested for that.

"The Court: Mr. Powell, in order to shorten this matter: Don't you expect to prove by the rest of these gentlemen the same thing as by Dr. Baker and Dr. McCloud?

"Mr. Powell: Yes, sir, I have a number of other witnesses by whom I expect to prove the same thing.

"Mr. Duke: We will admit they will swear that.

"The Court: That is a matter of common knowledge.

"Mr. Lum Duke: We will admit that every preacher who is present will swear substantially the same thing.

"The Court: That he would swear that if he were put on the stand.

"Mr. Powell: I have a number of other witnesses, one, two, three, four, five.

"The Court: Just give their names to the reporter.

"Mr. Powell: A. C. Windham, W. H. Perry, M. C. Schrader, O. M. Mesick, Wilbur Walton, J. B. Seay, W. A. Hamilton, J. L. Griffin. We hope to prove by each of them substantially the same thing: That they distributed literature in and about their regular faith and practice, that that was common knowledge to the governing factors of the City, and no efforts, it is made with their approbation, no effort was made to arrest or confine them or imprison them in any way, that they have no license for such distribution, and that the only ones that have been arrested under this ordinance and charged with distributing religious literature of their faith and practice were the defendants.

"Mr. Duke: That is not the evidence. I would like to recall the officer to prove that.

"The Court: You move to exclude that?

"Mr. Duke: Yes, sir, all of it.

"The Court: The testimony is excluded that these ministers have given here. I don't think it applies as matter of defense. You have the benefit of that just the same as if all these gentlemen had testified.

"Mr. Powell: I suppose this would be excluded but want to get it in the record, that we propose to recall the City authorities and prove by them that no case has ever been made or ever offered to be made against any other class of religious belief except Jehovah's Witnesses.

"Mr. Duke: If he wants to call them as his witnesses. We object to calling them as our witnesses.

"Mr. Powell: It would be in rebuttal.

"The Court: Call your witness."

Testimony of Will Samford

Whereupon, WILL SAMFORD, a witness sworn in behalf of the defendant, testified substantially: I live in Opelika; I know the defendant and have known him about 12 months. I know the defendant's general reputation for truth and veracity and sobriety in the community ever since he has been in Opelika; his reputation is good.

"Q. Upon the basis of that would you believe him on oath?

[fol. 57] "Mr. Lum Duke: We object.

"The Court: Yes. His character has not been impeached.

"Mr. Powell: I would like to also prove by this witness that Roscoe Jones is a minister of the Gospel and is engaged in such work. :

"The Court: That is without conflict.

"Mr. Lum Duke: We admit it.

"Mr. Powell: I would like to have it in the record.

"The Court: It is in there that they admit he is a minister of the Gospel.

"Mr. Duke: Of Jehovah's Witnesses.

"The Court: Yes.

"Mr. Powell: I have other witnesses, J. L. Battle, Albert Trimble and Fred Slaughter I would like to prove the same thing by.

"The Court: It is the rule in Alabama with respect to character for truth and veracity that testimony tending to show that they are of good reputation for truth is not admissible unless the adversary party has first attacked it. You cannot put a man on the stand and let him testify and then put somebody else on the stand and let them testify that believe him on his oath. That is not the rule in Alabama.

"Mr. Powell: I believe that would be all.

"The Court: All right.

"Mr. Powell: We would like to renew our motion to dismiss on the grounds stated in the written motion and on additional ground that no evidence has been offered to show the guilt of the defendant.

"The Court: Yes, you raise that, Mr. Powell, with the record by asking for it in writing, for what we call the affirmative charge: If the Court believes all the testimony in the case he would find the defendant not guilty, and the Court would mark that refused and let you have the benefit of it.

"Mr. Powell: I have a motion to that effect.

"The Court: File that and note that it was filed at the conclusion of the offering of the testimony.

"The Court: Have you anything in Rebuttal?

[fol. 58] "Mr. Duke: No, sir.

"The Court: I will overrule your motion, Mr. Powell.

"Mr. Powell: Yes, sir. We desire to except.

"The Court: Do you desire to argue?

"Mr. Powell: Not if the other side don't wish to argue.

"The Court: That does not preclude you from arguing.

"Mr. Powell: No, sir. We have argued quite a bit already and it would be only a repetition of things we have already stated.

"The Court: Yes, sir.

"Mr. Powell: I think the Court has clearly in mind the evidence and the law we have referred to, so I do not believe I will argue the case either.

The foregoing was substantially all the evidence in said cause and all the evidence tended to show and all the proceedings in said cause not of record.

The above and foregoing bill of exceptions was presented to me by the defendant Roscoe Jones on this 30th day of January, 1940, within the time required by law, as and for a legal bill of exceptions in said cause.

(Signed) W. O. Brownfield, Clerk Circuit Court of Lee County, Alabama.

[fol. 39] ORDER SETTLING BILL OF EXCEPTIONS.

The above and foregoing having been presented to the Clerk of the Circuit Court of Lee County, Alabama, by the defendant Roscoe Jones as and for a legal bill of exceptions in said cause on January 30, 1940, within the time required by law, the same is accordingly signed as and for a legal bill of exceptions in said cause by the Honorable W. B. Bowling, the Judge presiding at the trial of said cause, on this, the 29 day of February, 1940.

(Signed) W. B. Bowling, Presiding Judge.

IN CIRCUIT COURT OF LEE COUNTY

ORDER RE EXHIBITS—Filed March 18, 1940

To the Clerk of the Circuit Court of Lee County, Alabama:

You are hereby authorized and directed to certify to the Court of Appeals of Alabama, with the record on appeal

in this cause the following exhibits offered by plaintiff The City of Opelika and admitted in evidence on the trial:

1. A booklet entitled "Face the Facts", and
2. A booklet entitled "Facism or Freedom".

This, 29 day of February, 1940:

(Signed) W. B. Bowling, Presiding Judge.

[fol. 60] Citation, in usual form, showing service on Tom Starling omitted in printing.

[fol. 61] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 62] IN COURT OF APPEALS OF ALABAMA

ASSIGNMENT OF ERRORS

First

The Court erred in overruling and denying defendant's motion to dismiss, which said motion reads as follows, to wit:

"The defendant moves to dismiss this case and for his discharge upon the following grounds:

"That the complaint is invalid and does not state facts sufficient to constitute an offense under the law;

"That the ordinance in question is invalid and void by reason that it is in direct conflict to the Constitutions of this State and of the United States, in this:

"That it restricts freedom of speech, freedom of press, and freedom of worship of Almighty God;

"That the ordinance in question is in direct violation of the Fourteenth Amendment of the Constitution of the United States.

"That the evidence by the prosecution shows defendant is not guilty."

"The defendant therefore prays this court to dismiss this case and that he be discharged."

The Court should have sustained the foregoing motion upon each and every ground thereof and for the reasons assigned therein and for the further reasons as follows, to wit: (R. P. 6)

A

Because the complaint is invalid and does not state facts sufficient to constitute an offense under the law as particularized as follows:

1. Paragraph one of said complaint the charge is made that, "he did sell books contrary to the license ordinance," (R. p. 3) "is invalid and therefore repugnant to the State and Federal Constitutions because it denies defendant free-[fol. 63] dom of speech, freedom of press, freedom of worship of Almighty God and is further invalid as to the defendant, who, as a minister of the Gospel, was engaged in such work at the time charged, and his offer to distribute the booklets "Face the Facts and Learn the Way to Escape", and "Fascism or Freedom" containing information and opinion was collateral to the main object of the defendant, which was to preach and teach the gospel.

2. Paragraph two of the complaint, which reads in part: "He did operate as a book agent . . . contrary to the license ordinance," (R. p. 3) is likewise invalid and repugnant to the State and Federal Constitutions and inapplicable to the defendant for the same reasons just above assigned because it denies him freedom of speech, freedom of press, and freedom of worship of Almighty God, as defendant is one of Jehovah's witnesses and was engaged in his regular work as a minister and the distribution of pamphlets of Jehovah's Witnesses was collateral to the main object of the defendant, which was to preach and teach the gospel.

3. That paragraph three of the complaint which says, "He did operate as a transient agent of books," (R. p. 3) is likewise invalid and repugnant to the "Due process of Law" clause of both the State and Federal Constitutions for the reasons assigned in paragraphs one and two and for the further reason that the same is discriminatory in that it puts different pains and penalties upon "transient" to that of a "resident" and therefore could not apply to the defendant, a minister of the gospel, one of Jehovah's witnesses, as distribution of the pamphlets in question was collateral to the

main object of the defendant which was to preach and teach the gospel and denies to him freedom of speech and freedom of press and freedom of worship of Jehovah God.

4. That paragraph four of the complaint is likewise invalid; it charges: "he did operate as a transient dealer of books" (R. p. 3) and is invalid and repugnant to the "Due Process" clause of both the State and Federal Constitutions because upon its face it is discriminatory in that different pains and penalties are put on "transients" to "residents" and therefore could not apply to the acts of the defendant because the defendant is a minister of the gospel and was [fol 64] acting in line of his duties as such at the time charged, distributing printed matter which was collateral to the main object of the defendant, which was to preach and teach the gospel of the Kingdom and would also deny him freedom of speech and freedom of the press and freedom of worship.

5. That paragraph five of the Complaint is for the same reason invalid; it says, "he did operate as a transient distributor of books . . . (R. p. 4) because it is discriminatory, putting different pains and penalties upon "transient" to "residents" and denies freedom of speech, freedom of the press and freedom of worship of Almighty God and is therefore repugnant to the "Due Process of Law" clause of the State and Federal Constitutions and would interfere with defendant's work as a minister of the gospel in distributing the same in printed form which distribution was collateral to the main object of the defendant which was to preach and teach the gospel of the Kingdom.

B

That the ordinance known as "city license schedule for 1939" which provides: "Book agents, \$10 (R. p. 17); transient agents or dealers or distributors of periodicals or books, \$5 (R. p. 23); transient dealers (in periodicals or books) \$25" (R. p. 23) is invalid and void by reason of the fact that it is in direct conflict with the Constitution of this State and the United States, in this: that it restricts the freedom of speech, freedom of press, and freedom of worship of Almighty God, and is discriminatory; that the ordinance in question is in direct violation of the Fourteenth Amendment of the Constitution of the United States, therefore the court erred in not sustaining the motion to dismiss on this ground of the motion.

C

The court erred in overruling that part of the motion to dismiss which says: "That the evidence by prosecution shows defendant is not guilty," (R. p. 6) as all the evidence shows that defendant was a minister and engaged in offering to distribute doctrines and tenets of his faith and for which he was arrested, contrary to and therefore repugnant [fol. 65] to the constitution of this State and the "Due Process" clause of the Fourteenth Amendment of the Constitution of the United States.

Second

The court erred in ruling out testimony over objection of defendant, that defendant's activity at the time in question was in furtherance of his work as a minister of the gospel:

"The Court: You can state to reporter what you expect to prove. I do not see that the matter of religion is involved in the question of the violation of this ordinance. But if you desire to offer evidence along that line state to the reporter what you desire to show by this witness if you can show it.

"Mr. Powell: We hope to show that this defendant was a regularly ordained minister of the Gospel, and that his activity at the time in question was in furtherance of his work as such minister, and that this is an effort to interfere with his right to worship and with that religious activity at that time. (R. p. 27.)

"The Court: Well I will sustain an objection to that testimony, I don't think—

"Mr. Powell: Note an exception.

"The Court: It applies in this case (R. p. 27) as the same was material to his defense under the State and Federal Constitutions and thereby denying to him a fair and impartial trial, contrary to "Due-Process" clause of the State and Federal Constitutions.

Third

The court erred in excluding expert testimony of Norman McCloud, Minister of Methodist Church, as follows:

"The Court: Mr. Powell, in order to shorten this matter: Don't you expect to prove by the rest of these gentlemen the same thing as by Dr. Baker and Dr. McCloud?

"Mr. Powell: Yes, sir. I have a number of other witnesses by whom I expect to prove the same thing.

[fol. 66] "Mr. Duke: We will admit they will swear that. (R. p. 39)

"The Court: Just give their names to the reporter.

"Mr. Powell: A. C. Windham, W. H. Perry, M. C. Schrader, O. M. Mesick, Wilbur Walton, J. B. Seay, W. A. Hamilton, J. L. Griffin. We hope to prove by each of them substantially the same thing: That they distributed literature in and about their regular faith and practise, that that was common knowledge to the governing factors of the City, and no efforts, it is made with their approbation, no effort was made to arrest or confine them or imprison them in any way, that they have no license for such distribution, and that the only ones that have been arrested under this ordinance and charged with distributing religious literature of their faith and practise were the defendants. (R. p. 39)

"The Court: The testimony is excluded that these ministers have given here. I don't think it applies as matter of defense. You have the benefit of that just the same as if all these gentlemen had testified." (R. p. 40)

showing that distribution of literature about their faith and practice is a proper part of the work of a minister as the same was material and vital to his defense, thus denying to defendant a fair and impartial trial and "Due Process of Law" under the above mentioned State and Federal Constitutions.

Four

- The charges against the defendant when he was put on trial in the Circuit Court were entirely different from the charges made against him in the Recorder's Court, and from which an appeal was taken to said Circuit Court, and which new charges were made known to him first when his case was called for trial in the Circuit Court. The original charge was for "Violation of city ordinance of Opelika (R. p. —). The said new charges embraced in the complaint (R. p. —) charged that, "he did sell books," "as a book agent", as "a transient agent", "as a transient

dealer", "as a transient distributor", thus denying defendant [fol. 67] and "Due Process of Law" under said State and Federal Constitutions.

Fifth

The Court erred in denying defendant's demand for a trial by jury entered on appeal bond (R. p. 3) contrary to the "Due Process of Law" clause of said State and federal Constitutions.

Sixth

The Court erred in overruling defendant's motion for a new trial for all the reasons set forth and particularized therein (R. p. 10) when the same should have been sustained upon each and every ground set forth therein.

(Signed) Grover C. Powell, Attorney for Appellant.

There is no error in the record.

(Signed) Duke & Duke, Attorneys for Appellee.

[fol. 68] IN COURT OF APPEALS OF ALABAMA

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—November 19, 1940

Come the parties by attorneys, and argue and submit this cause for decision.

IN COURT OF APPEALS OF ALABAMA

JUDGMENT—March 18, 1941

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is manifest error. It is therefore considered that the judgment of the Circuit Court be reversed and annulled, and this Court proceeding to render the judgment that the Circuit Court should have rendered doth order and adjudge that a judgment be rendered for appellant. It is also considered that the Appellee pay the costs of appeal of this Court and of the Circuit Court.

IN COURT OF APPEALS OF ALABAMA

5 Div. 109.

ROSCO JONES

v.

CITY OF OPELIKA

Appealed from Lee Circuit Court.

OPINION

RICE, Judge:

Appellant, when arrested; was going about the streets of the City of Opelika, holding two little pamphlets in his [fol. 69] hand, and saying to the public: "Get your two copies for five cents."

Copies of the two pamphlets mentioned are before us, and we find in them nothing obscene or immoral; or which advocates unlawful conduct; or which is calculated to "disturb public order."

Here, as in the case styled *City of Cincinnati, Appellee v. Mosier, Appellant*, decided by the Court of Appeals for Hamilton County (Ohio), and reported in 61 Ohio Appellate Reports at page 81, the evidence developed that the "books" peddled were religious books, pamphlets or tracts (one was: *Face the Facts—and learn the only way of escape*; and the other: *"Fascism or Freedom"*), and "there is no evidence that such literature was in any way subversive of the morals of the public or inimical to our form of democratic government, or calculated to create a disturbance or breach of the peace of the country, or had the effect of interfering with the public welfare."

Appellant is an ordained minister of the gospel of Jehovah's Kingdom and (as he contends, without dispute in the testimony) one of Jehovah's witnesses, consecrated to bear witness concerning the Kingdom of Jehovah God. The sole mission of the pamphlets is to set forth the gospel of the Kingdom of God as he believes and preaches it.

He did not, he says, apply for or obtain a license (to "peddle" his pamphlets) because he regarded himself as sent by Jehovah God to do his work and believes that such application would have been an act of disobedience to Jehovah's Commandments which would result in his eternal destruction.

Appellant was tried in the Recorder's Court of the City of Opelika, and convicted, on the charge of selling or offering to sell books without a license being first obtained from the Clerk of said city as required by the city ordinance.

He appealed to the circuit court, where he was again convicted before the judge, sitting without a jury, and hence this appeal.

His defense was the unconstitutionality and invalidity of the ordinance (as applied to him), which requires a license to distribute printed matter. He says that it is in conflict with the Constitution of the State, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution in the following particulars, viz:

(a) It abridges and denies freedom of speech and freedom of the press. And (b) It abridges freedom of worship and freedom of conscience and religious liberty.

[fol. 70] The part of the ordinance of the City of Opelika that was applied to appellant is as follows:

"Be it ordained by the Board of Commissioners of the City of Opelika, Alabama, that the following schedule of rates for license or privilege taxes for conduct of any trade, vocation, profession or any other business conducted in the City of Opelika and its police jurisdiction for the year beginning January 1, 1939, and ending December 31, 1939, and the following conditions and provisions for the conduct thereof, and the following penalties for the violation thereof be and it is hereby adopted, to-wit:

"All licenses, permits or other grants to carry on any business, trade, vocation or profession for which a charge is made by the City shall be subject to revocation in the discretion of the City Commission with or without notice to the licensee. No license shall be issued to any bootblack, news stand, pop corn stand, weiner stand, or other similar stand for the sale of any product where said stand proposes to locate on any street, alley or sidewalk of the City unless written permission be granted by the City Commission of the City of Opelika.

"Agents, book agents (Bibles excepted) \$10.00.

"Transient agents or dealers or distributors of books (annually only) \$5.00." (Italics supplied by us.)

We are unable to distinguish the principle implicit (as applied to appellant) in the above quoted provisions of the

ordinance of the City of Opelika, from that involved in the ordinance of the City of Griffin, Georgia, dealt with by the Supreme Court of the United States in the case of *Lovell v. City of Griffin*, 303 U. S. 444. There seems to us nothing more objectionable, legally, in requiring all who would distribute circulars, hand books, advertising, or literature of any kind, whether said articles are being delivered free, or whether same are being sold, to first obtain written permission from the City Manager of the City of Griffin (as in *Lovell v. City of Griffin* case, *supra*), than there is, here, in, while pretending to provide a general license ordinance, providing, as a matter of fact, that the license is held at the sole, unbridled and complete, discretion of the City Commission of the City of Opelika.

And so, following the reasoning of the Supreme Court of the United States in the *Lovell v. City of Griffin* case, *supra*, [fol. 71] we may say, here, that the ordinance of the City of Opelika in question, as applied to appellant, "is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. . . . Legislation (and it is well settled that municipal ordinances adopted under State authority constitute State action and are within the prohibition of the First Amendment to the Constitution of the United States which is made applicable to the States by the provisions of the Fourteenth Amendment to the Constitution of the United States) of the type of the ordinance in question would restore the system of license and censorship in its baldest form."

Of course, "freedom of speech and freedom of the press; which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by State action."

We cannot say here—as the Supreme Court of the United States said in the *Lovell v. City of Griffin* case, *supra*—that the ordinance in question is "invalid on its face"—this for the reason that same purports to be but a simple license ordinance, such as is adopted by most cities.

But, as applied to appellant the ordinance, for reasons we hope we have made clear hereinabove, is invalid—void, and of no effect.

It—when undertaken to be so applied—as was said by the Court of Appeals for Hamilton County (Ohio) in the

case of Cincinnati, Appellee v. Mosier, Appellant, supra: "can have no more application than it would if it were attempted to apply it to an act performed outside the State, County, or City."

The judgment of conviction rendered by the Circuit Court is reversed.

And a judgment here, and hereby, rendered discharging appellant from further custody in these proceedings.

Reversed and Rendered.

IN COURT OF APPEALS OF ALABAMA

APPLICATION FOR REHEARING—March 31, 1941

Comes the Appellee, City of Opelika, by its Attorneys of Record, Duke & Duke, and applies to the Court for a [fol. 72] Rehearing on the judgment rendered by this Court in this cause on March 18, 1941, and prays for an order of the Court or a justice thereof, that the pendency of this application for rehearing shall stay or suspend the execution of the judgment of the Court, and as grounds for said Rehearing assigns the following:

1. The Court of Appeals erred in holding that Section 1 under Conditions and Provisions of the City License Schedule for 1939, as applied to appellant, is invalid—void, and of no effect.

2. The Court of Appeals erred in holding that the entire City License Schedule for 1939, as applied to Appellant, was invalid—void, and of no effect, merely because Section 1 under Conditions and Provisions of the City License Schedule for 1939 was in conflict with the Fourteenth Amendment of the United States.

Wherefore, Appellee prays that said Rehearing may be granted.

Respectfully submitted, (Signed) Duke & Duke, Attorneys for Appellee.

I hereby certify that a copy of this Motion was delivered to Hon. Grover C. Powell, Attorney of record for Appellant on the 26th day of March, 1941.

(Signed) Wm. S. Duke, Attorney for Appellee.

IN COURT OF APPEALS OF ALABAMA

ORDER OVERRULING APPLICATION FOR REHEARING—April 22,
1941

It is ordered that the application for rehearing be and the same is overruled.

Per Curiam.

[fol. 73] Clerks' certificates to foregoing transcript omitted in printing.

[fol. 74] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Alabama is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(7920)

FILE COPY
JUL 16

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Number 280

■
ROSCO JONES,

Petitioner

v.

CITY OF OPELIKA,

Respondent

■
Petition for Writ of Certiorari
to the Supreme Court of Alabama

JOSEPH F. RUTHERFORD

HAYDEN COVINGTON

Attorneys for Petitioners

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Number

■

ROSCO JONES,

Petitioner

v.

CITY OF OPELIKA,

Respondent

■

**Petition for Writ of Certiorari
to the Supreme Court of Alabama**

To the SUPREME COURT OF THE
UNITED STATES OF AMERICA:

The petition of Rosco Jones shows to the Supreme Court of the United States as follows:

A

Summary Statement of Matters Involved

1. Statement of Facts.

The petitioner is an ordained minister of Jehovah God and known as one of Jehovah's witnesses.

This is a criminal action. The petitioner was arrested in the City of Opelika, Alabama, and charged with an alleged violation of an ordinance of that city providing for

the taxing and licensing of trades and vocations conducted within the city. Among other things the ordinance provides for the licensing and taxing of book agents and transient dealers or distributors of books.

On the 3rd day of April, 1939, he was tried in the Recorder's Court of said city and convicted of selling or offering to sell books without a license being first obtained from the clerk of said city as required by the city ordinance aforesaid. He was fined \$50.00 and costs and in default of payment thereof was sentenced to serve 90 days at hard labor for the city. He subsequently in due time appealed to the Circuit Court of Lee County, Alabama, and in due course a trial de novo was held of his case before W. B. Howling, judge of said circuit court. Upon such trial he was found guilty and again fined the sum of \$50.00 and costs; and from which judgment he duly appealed to the Court of Appeals of Alabama.

The facts established by the undisputed evidence upon the trial were: That petitioner is an ordained minister of Jehovah God duly ordained to preach the Gospel of God's Kingdom under Christ Jesus, of which he was commanded to bear witness or give testimony as such minister by and through public distribution of Bible literature. At the time of his arrest he was walking along the sidewalk holding in his hand the booklets "Face the Facts" and "Fascism or Freedom" and offering the two booklets to those whom he met on the sidewalk for a small contribution of five cents. The literature in question was introduced in evidence as exhibits and clearly shows that it is devoted exclusively to explanation of Bible prophecy. The contents of this literature related to a revelation of said prophecies recorded centuries ago as they are now being fulfilled. The literature further showed that the time is near at hand when Jehovah, the Almighty God, will completely destroy Satan and his entire organization, consisting of commercial, political and ecclesiastical elements, in the "battle of that great day of God Almighty" at Arma-

geddon; which destruction shall be immediately followed by a complete establishment of God's Kingdom throughout the entire earth, to bring everlasting peace, joy, prosperity, happiness and everlasting life to all survivors of Armageddon and eventually also to many who have died in times past and who shall be resurrected to live upon earth. The contents, in part, are admittedly an attack upon religion as practiced today and at all times since man has been upon earth, but at the same time such books clearly set forth the true distinction between all organized religion and the true worship or service of Almighty God, which is Christianity. Such books thereby expose religion as a snare and a racket of the very worst kind, and that religion is in no way related to or a part of Christianity. For further explanation see the exhibits.

Petitioner did not apply for or obtain a license because as testified by him he was an ordained minister of Jehovah God preaching the Gospel in the exact manner commanded by Him and following in the footsteps of the Lord Jesus and the apostles and to apply for a permit to do what Jehovah God commands him to do would be an insult to Almighty God, a violation of His law, which would result in his everlasting destruction. The petitioner testified that, as commanded by the Bible, 'he chose to obey God rather than man.' (Acts 20:20)

The testimony and evidence appears in the Record at pages 39 to 55, to which further reference is here made.

In due time the appeal of the conviction in question came on for a hearing in the Court of Appeals of Alabama; and thereupon that court took the case under advisement. On the 18th day of March, 1941, said Court of Appeals rendered a judgment reversing the judgment of the trial court and setting aside the conviction. (R. 61) An opinion was written and filed on said date of March 18, 1941, in which said court held that the ordinance in question had been wrongfully applied and that as so construed and applied the same was unconstitutional and void, repugnant

to the Fourteenth Amendment to the United States Constitution, because petitioner had been thereby denied his rights of freedom of speech, of press and of worship of Almighty God. The said court found the above facts said that the case could not be distinguished from the cases of *Lovell v. Griffin*, 303 U. S. 444, and *Cincinnati v. Mosier*, 61 Ohio App. 81. The opinion of said court is printed in the Record. (R. 62) A motion for rehearing was duly filed by respondent and denied. (R. 66)

Thereupon the respondent applied to the Supreme Court of Alabama, through petition for certiorari, seeking to review the ruling of said Court of Appeals. (R. 1) Upon a filing of this petition for certiorari the entire record, proceedings and judgments of the courts below were subsequently considered by the Supreme Court of Alabama. (R. 2) [Judgment of the Supreme Court] On May 22, 1941, the Supreme Court of Alabama rendered and entered a judgment reversing and annulling the judgment of the Court of Appeals and remanded the proceedings to such court for further proceedings not inconsistent with the opinion of said Supreme Court. On the same day, May 22, 1941, the said Supreme Court filed its opinion holding that *Lovell v. Griffin*, supra, was not controlling in the case and that the ordinance had not been wrongfully applied; that the ordinance was constitutional as applied, that the petitioner was not denied any constitutional rights through the conviction, and that the judgment of the trial court should be affirmed. (R. 3)

2. *Statute here drawn in question.*

The legislation here drawn in question is that part of an ordinance of the City of Opelika, Alabama, that was applied to the petitioner, reading, among other things, as follows:

"Be it ordained by the Board of Commissioners of the City of Opelika, Alabama, that the following sched-

ule of rates for license or privilege taxes for conduct of any trade, vocation, profession or any other business conducted in the City of Opelika and its police jurisdiction for the year beginning January 1, 1939, and ending December 31st, 1939, and the following conditions and provisions for the conduct thereof, and the following penalties for the violation thereof be and it is hereby adopted, to-wit:

"All licenses, permits or other grants to carry on any business, trade, vocation or profession for which a charge is made by the city shall be subject to revocation in the discretion of the City Commission with or without notice to the licensee. No license shall be issued to any bootblack, newsstand, popcorn stand, weiner stand, or other similar stand, for the sale of any product where said stand proposes to locate on any street, alley or sidewalk of the city unless written permission be granted by the City Commission of the City of Opelika. . . .

"Agents, book agents (Bibles excepted) \$10.

"Transient agents or dealers or distributors of books (annually only) \$5."

The ordinance appears in the Record at pages 21-38.

3. *Substantial Federal Questions Presented.*

By motion to dismiss duly filed in the Recorder's Court, petitioner raised the Federal questions here presented, asserting that the ordinance was in violation of the Fourteenth Amendment to the United States Constitution in that the ordinance as construed and applied denied and deprived the petitioner of his rights of freedom of speech, of press and of worship of Almighty God contrary to the aforesaid Amendment to the United States Constitution.

The said Recorder's Court duly considered and passed upon such questions and specifically held that the ordinance was applicable and that petitioner was not denied his rights of speech, of press and of worship.

At the close of all the evidence on the trial de novo in the Circuit Court before the judge, without a jury, on November 2, 1939, the petitioner duly filed in writing his motion to dismiss the charges on the grounds that the ordinance in question under which the complaints had been filed had no application to the facts and that as applied, was void and unconstitutional in that it deprived the petitioner of his rights of speech, of press and of worship contrary to the Fourteenth Amendment to the United States Constitution. (R. 14, 15) The Circuit Court denied the motion to dismiss and held that the ordinance properly covered the petitioner and as construed and applied did not deprive the petitioner of said rights contrary to the Constitution and was therefore constitutional. (R. 16)

These questions were properly and duly preserved by the petitioner in harmony with the practice of the State of Alabama and were thereafter duly presented to the Court of Appeals of Alabama. The said Court of Appeals specifically considered and sustained each of the points so presented and held that the ordinance as construed and applied to the petitioner was contrary to the Fourteenth Amendment to the United States Constitution and ordered the conviction set aside and complaint dismissed. Said court specifically found the petitioner to be an ordained minister of the Gospel of Jehovah's Kingdom and for such reason did not come within the terms of the said ordinance. (R. 62) [Opinion]

The respondent by motion for rehearing duly filed claimed that the said Court of Appeals erred in holding that the ordinance as construed and applied violated the Fourteenth Amendment of the United States Constitution. The motion for rehearing in the Court of Appeals was overruled. (R. 66) When the petition for certiorari was

filed with the Supreme Court of Alabama the said Supreme Court had before it and considered the entire record of the case and specifically considered the assignments of error urged by the petitioner in the said Court of Appeals. The Supreme Court of Alabama specifically overruled each of such assignments of error and contents urged by petitioner and specifically held that the ordinance was applicable and that the petitioner was not denied his rights of freedom of speech, of press and of worship contrary to the Fourteenth Amendment to the United States Constitution. (R: 3) [Opinion]

Therefore there are presented for review substantial Federal questions to this Court as follows:

Is the ordinance in question as construed and applied by the court below violative of the Fourteenth Amendment to the United States Constitution in that it abridges and denies petitioner's rights of freedom of speech, of press and of worship of Almighty God secured and included within the "due process" clause of said Amendment?

B

Reasons Relied on for Allowance of Writ

The questions presented here are of national importance and basically affect the fundamental personal and civil rights of every person domiciled within the United States. The Supreme Court of Alabama has rendered a decision on a most important Federal question in a way that nullifies the Constitutional guarantees and provisions with respect to personal freedom. The opinion of that court has misconstrued opinions of this Court and warped them so as to deprive them of their true meaning for the purpose of amputating the petitioner's freedom. The opinion and decision of the Alabama Supreme Court is in direct conflict with applicable decisions of this Court. Such court has radically and so far departed from the accepted and

usual course of judicial proceedings as to demand an order of this Court halting such extraordinary departure from established principles of liberty and constitutional law. In effect the opinion and decision has placed a "foreign amendment" upon the Constitution without "due process". It is based upon the sophistry that streets belong to the public and activity thereon can be licensed. It is founded on the proposition that freedom of the press means "free of charge distribution" and does not cover "sale" or exchange for contributions. The opinion is directly contrary to the Court of Appeals in the case at bar, which Court of Appeals opinion expresses the applicable American rule.

The decision and opinion is grounded upon the case of *Cox v. New Hampshire*, 312 U. S. 275, which case is obviously not at all in point. The opinion is based upon the opinion by the Circuit Court of Appeals in the case of *Manchester v. Leiby*, 117 F. (2) 661 (certiorari denied 61 S. Ct. 838). The ordinance involved in the *Leiby* case was not at all in point with the ordinance here questioned. Furthermore we submit that the *Leiby* opinion by the First Circuit Court of Appeals is contrary to the Constitution and applicable opinions by this Court. We say that the denial by this Court of the petition for certiorari on April 7, 1941, did not constitute an approval by this Court of the reasoning expressed in the opinion and did not constitute approval of the holding that the ordinance there involved was valid. This Court has repeatedly said that the denial of certiorari does not amount to an approval of the merits or reasoning of the court below. See *United States v. Carver*, 260 U. S. 482, 490; *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. S. 251, 258; *Ohio ex rel. Seney v. Swift & Co.*, 260 U. S. 146, 151; *Atlantic Coast L. R. Co. v. Powe*, 283 U. S. 401, 403.

The holding of the Supreme Court of Alabama (to the effect that the preaching of the Gospel of God's Kingdom through distribution of printed literature for which con-

tributions were received when done on the *streets* of the City of Opelika is not entitled to the protection of the Constitutional guarantees against application of an ordinance requiring the licensing of "book agents or transient dealers of books") is a new theory entirely foreign to American life and pioneer jurisprudence established by our forefathers, which should be removed and eradicated by this Court before it reaches more devastating consequences. The court below held that the guarantee of freedom of the press does not extend to "sale" of printed information and opinion, i.e., if money was accepted for the literature distributed, that such transaction took the matter beyond the reach of the Fourteenth Amendment to the United States Constitution. This identical contention was made by the Supreme Court of Errors of the State of Connecticut in the *Cantwell* case, 310 U. S. 296, which contention was expressly rejected by this Court as foreign.

Petitioner was engaged in the circulation of printed matter containing information about the Kingdom of Almighty God which is shortly to be established on the earth and also containing Bible explanations of present conditions of distress and perplexity prevalent in the earth. There is no distinction or difference between this case and the cases of *Schneider v. Town of Irvington*, 308 U. S. 147, *Lovell v. Griffin*, 303 U. S. 444, and *Cantwell v. Connecticut*, supra, all of which announce the Constitutional guarantee as to the activity of this petitioner. The Alabama Supreme Court ruled directly in conflict with the above decisions and strained at a distinction which is impossible to reach when viewed in the light of this Court's prior rulings.

The court below relies mainly upon the *Manchester v. Leiby*, supra, opinion on the theory that such case said it was "the sale which could be regulated". The First Circuit Court by obiter dictum discussion in the case of *Hannan et al. v. Haverhill et al.* (now before this Court on petition for certiorari) has, at least, said that the right of freedom of the press was not confined to free distribution, and said

that if such were the rule then the exercise of the right of press would become the prerogative of the well-to-do and wealthy class, partially overruling its prior opinion in *Manchester v. Leiby*. In that case that court also held that a city might require a license for commercial peddling of merchandise other than literature while it could not license the sale of literature.

Another reason relied upon for the allowance of the writ is the fact that petitioner is an ordained minister of the Gospel of the Kingdom of Almighty God and as such minister he does not come within the provisions of the ordinance because he preaches by publicly distributing literature on the streets concerning these matters and from some who take the literature he receives contributions to aid in printing and distributing more like literature. It cannot be said by anyone, even this Court, that such does not constitute "preaching the Gospel". The apostles each and all taught and preached publicly and from house to house. (Acts 20: 20) See also Proverbs 1: 20, 21.

The activity of preaching the Gospel thus cannot be regulated by permit from the municipality or state even when carried on upon the streets; because the streets have been held from time immemorial as the natural and proper place for the dissemination of information and opinion on such matters as this. (*Schneider v. State*, supra)

Furthermore, the ordinance in question confers arbitrary and discriminatory powers of "prior censorship of press" upon the City Commission and confers upon the Commission the unlimited and arbitrary power of revocation of licenses without notice. Thus the ordinance is void on its face because it attempts to regulate the press activity of all persons dealing in books or booklets within the city.

Wherefore your petitioner prays that this Court issue a writ of certiorari to the Supreme Court of Alabama, directing such court to certify to this Court for review and determination on a day certain to be therein named, a full

and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the decree of the court be reversed and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

ROSCO JONES,

Petitioner

By

JOSEPH F. RUTHERFORD

HAYDEN COVINGTON

Attorneys for Petitioner

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A

Opinions of the Court Below

The opinion of the Supreme Court of Alabama is not yet officially reported. It appears in the Record at pages 3 to 9. The opinion of the Alabama Court of Appeals is not yet officially reported. It appears in the Record at pages 62 to 65.

B

Jurisdiction

1. *Timeliness.*

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code [28 U. S. C. A. 344 (b)].

The judgment of the Supreme Court of Alabama was rendered and entered of record on the 22nd day of May, 1941. (R. 2)

The petition for writ of certiorari is filed herein before the expiration of three months from the date the decree and judgment of said Supreme Court of Alabama was rendered and entered, which is within the time allowed by law.

2. *The statute.*

The validity of state legislation under the United States Constitution was drawn into question in this case and the decisions of each of the trial courts and the Supreme Court were wrongfully in favor of its validity, while the decision of the Alabama Court of Appeals was against its validity, which court's judgment was set aside by the Supreme Court of Alabama. The legislation challenged here is an ordi-

nance of the City of Opelika, Alabama, which was in full force and effect at the time of the transaction in question, reading in words and figures as follows:

"Be it ordained by the Board of Commissioners of the City of Opelika, Alabama, that the following schedule of rates for license or privilege taxes for conduct of any trade, vocation, profession or any other business conduct in the City of Opelika and its police jurisdiction for the year beginning January 1, 1939 and ending December 31st, 1939, and the following penalties for the violation thereof be and it is hereby adopted, to-wit: . . .

"All licenses, permits or other grants to carry on any business, trade, vocation or profession for which a charge is made by the city shall be subject to revocation in the discretion of the City Commission with or without notice to the licensee. No license shall be issued to any bootblack, news stand, pop-corn stand, weiner stand, or other similar stand for the sale of any product where said stand proposes to locate on any street, alley or sidewalk of the city unless written permission be granted by the City Commission of the City of Opelika. . . .

"Agents, book agents (Bibles excepted) \$10.

"Transient agents or dealers or distributors of books (annually only) \$5.00."

(R. 21-23, 26)

In holding that the ordinance is not unconstitutional because it abridges freedom of speech, press and worship in violation of the Fourteenth Amendment to the United States Constitution, the Supreme Court of Alabama held that the statute properly applied to the activity of peti-

tioner and decided in favor of its validity on its face and as so applied. (R. 3-9)

Petitioner duly and properly urged in all the courts below that the said ordinance on its face and especially as applied and construed to him was invalid because it deprived him of above described rights contrary to the "due process" clause of the Fourteenth Amendment to the United States Constitution.

From the very beginning, therefore, the validity of the legislation here challenged as being in contravention of the Fourteenth Amendment was thus drawn in question. The judgments of the trial courts were in favor of the validity of such ordinance but the Alabama Court of Appeals held against its validity—however, the Supreme Court of Alabama found in favor of the validity thereof, reversing the Court of Appeals and affirming the trial court.

C

Statement of the Case

A full statement of the case has been given herein (supra, pages 1 to 7) and for the sake of brevity will not be repeated but is here referred to.

D

Specification of Errors

Petitioner assigns the following errors in the record and proceedings of said case:

The Supreme Court of Alabama committed fundamental error in reversing, setting aside and holding for naught the decision of the Court of Appeals and in affirming the judgment of the Circuit Court by ruling that the petitioner was guilty of a violation of said ordinance of the City of Opelika, because the said ordinance is invalid, as construed

and applied by the courts below, in that it deprives petitioner of his right of freedom of press, of speech, of conscience and of worship of Almighty God as commanded by Him in the Bible, contrary to the "due process" clause of the Fourteenth Amendment to the United States Constitution.

And for these reasons it is reversible error for the Supreme Court of Alabama to set aside the judgment of the Court of Appeals and affirm the judgment of conviction rendered by the Circuit Court and hold that the statute was valid and Constitutional.

The Supreme Court errs in holding that the ordinance as applied was a proper and valid exercise of the police power.

PRELIMINARY ARGUMENT

It is to be noted that the opinion, in addition to being extremely unsound and a radical departure from the applicable decisions of this Court in *Cantwell v. Connecticut*, supra, *Schneider v. Irvington*, supra, and *Lovell v. Griffin*, supra, the decision is also in conflict directly with the following opinions and decisions declaring such laws invalid as applied to the above described activity of Jehovah's witnesses in preaching the Gospel of God's Kingdom, that is to say, the cases of *People v. Kieran et al.*, 26 N. Y. S. (2) 291, *Tucker v. Randall* (N. J.), 15 A. (2) 325, *Commonwealth v. Anderson* (Mass.), 32 N. E. (2) 684, *City of Gaffney v. Putnam* (South Carolina Supreme Court opinion rendered June 2, 1941, unreported at time of this writing), *Semansky v. Stark, Sheriff*, 199 So. 129 (La.), *Thomas v. Atlanta*, 59 Ga. App. 520, 1 S. E. 2d 598, *Cincinnati v. Mosier*, 61 Ohio App. 81, *California v. Northum et al.*, 103 Cal. Supp. 295, 41 C. A. 2d 284, *Village of South Holland v. Stein*, 26 N. E. (2) 868 (Ill.). Each of the above cases involves Jehovah's witnesses shown to have been receiving contributions for the literature and working in the same

way as petitioner was doing it; and the ordinances and laws there held to be unconstitutional are very similar to the statute here drawn in question.

ARGUMENT

The ordinance in question is invalid and unconstitutional as construed and applied by the courts below in that it deprives petitioner of his right of freedom of press, of speech, of conscience and of his right to worship Almighty God as commanded by Him in the Bible, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

The pernicious doctrine that constitutionally secured "free press" extends only to "free distribution" (or "gift") of literature is a new theory unheard of until modern-day totalitarian principles have pushed to the fore. Such erroneous claim means that a person would be entitled to the protection of the constitutional guarantees of freedom of press against statutes such as this if he gave away printed matter, but if he "sold" such matter he would not be entitled to this fundamental personal privilege. The claim is, therefore, *foolish*. Newspapers, magazines and other periodicals are sold daily on the streets and elsewhere in every community of this land. Money is received in exchange. The newspaper industry is a profitable one and many have grown wealthy through it. They are entitled to all the guarantees of freedom of the press, even though they do gain great wealth through it. One who is doing good, such as the petitioner here, by constantly and continuously bringing printed matter on subjects of great importance to the attention of the public through "press activity" is entitled to let those receiving the information aid in keep-

ing the "good" work alive and going" by contributing a small sum with which to print more like literature. It is a ridiculous stalemate to hold that one must "go bankrupt" by forced "free" distribution of literature in order to receive the "free press" protection of the Constitution. Such a reprehensible contention, if permitted to stand, means the "death toll" to freedom of press in America. The taking of money for the literature is only incidental to the main activity of petitioner. It is a means to an end, that is to say, further proclamation of the Kingdom message of Almighty God.

The theory advanced by the Alabama Supreme Court would make constitutional guarantee of freedom of the press the sole prerogative of the rich. This would "sand-bag" the Constitution and sabotage all the liberties of the people.

In the case of *Cantwell v. Connecticut*, supra, the Connecticut Supreme Court of Errors attempted to distinguish the conviction under the solicitation statute on the grounds that 'it was the soliciting contributions' that brought them within the terms of the statute, "and not their more predominant activity of distributing literature." That doctrine was rejected by this Court. The opinion in the instant case is also contrary to *Schneider v. Irvington*, supra, where the undisputed evidence showed that one of Jehovah's witnesses received money contributions for books and was prosecuted under the ordinance "because she canvassed without a permit".

The undisputed evidence shows that the right which petitioner exercises is that of worshiping Almighty God by acting as an *ordained minister* in preaching the Gospel, and also press activity, and the action of the Opelika authorities in arresting and prosecuting him is in excess of their lawful authority; and it is the unconstitutional application of said statute to petitioner's activities that invalidates it.

It will be recalled that in the case of *Concordia Fire*

Insurance Co. v. Illinois, 292 U. S. 535, 545; the court said:

"Whether a statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another."

The petitioner is an *ordained minister* of the Gospel of God's Kingdom or Theocracy, which is a righteous government that will be fully established in the earth very shortly. He possesses credentials showing his ordination. He has entered into a covenant or agreement with Almighty God as provided in Isaiah 61:1, 2 and other scriptures to do the will of Almighty God, which is to preach or proclaim the judgments of Almighty God and His message of hope recorded in the Bible, to all people of good-will toward Almighty God. In order to enable such persons to flee from the Devil's organization to The Theocracy, and thus receive everlasting life under such righteous government, which will bring peace, prosperity and happiness to all who survive the battle of Armageddon — near at hand — Jehovah's witnesses preach the Gospel publicly throughout the land. To enable the petitioner to effectively thus preach the Gospel 'publicly and throughout every city until the cities are desolate' (Isaiah 6:11) the petitioner uses books, booklets, magazines and pamphlets which contain the entire message. This literature he employs as a substitute for talking, or sermons, and which is more effective because it can be studied by the recipients in the quiet of the home. Thus much time is saved and more people are reached.

In thus acting, the petitioner is a duly ordained minister of the Gospel of Jehovah God's Kingdom. It cannot properly be said that such conduct does not constitute a proper worship or service of Almighty God. This showing is conclusive upon all concerned in the matter. Further-

more, this Court has held that the individual alone is privileged to determine what he shall or shall not believe and how he shall exercise his right of conscience in performing such belief. The law of this land does not attempt to settle differences of creed and confession, and will not say that any point, doctrine or practice is too absurd to be believed. *Reynolds v. United States*, 98 U. S. 145, 162, quoting from Jefferson's Virginia Statute of Religious Freedom; also, *United States v. Macintosh*, 283 U. S. 605, 634.

If the practice or belief does not involve a violation of the law of morals, invade the right of property, or imperil, by clear and present danger, the safety of the nation and state, then such cannot be interfered with by any kind or character of statute, whether valid or invalid. Being bound by the conclusion that petitioner is an ordained minister, what is next presented?

Attention of this Court is kindly drawn to the case of *Thomas v. City of Atlanta*, supra, where one of Jehovah's witnesses was convicted under an ordinance prohibiting peddling without a license. In reversing the conviction, the Georgia Court of Appeals said:

"We do not think it is the duty of an ordained minister of the gospel to register his business with the city. Neither is it peddling for such minister to go into homes and play a victrola, or to preach therein or to sell or distribute literature dealing with his faith if the owner of such home does not object. The preaching and teaching of a minister of a religious sect is not such a business as may be required to register and obtain and pay for a license so to do. Neither is a sale by such minister of tracts or books connected with his faith a violation of a statute against peddling. Under the evidence in this case the sale of the book was collateral to the main object of the defendant, which was to preach and to teach his religion."

To the same effect is *Village of South Holland v. Stein*, supra, *Semansky v. Stark*, supra, *Cincinnati v. Masier*, supra, *Schneider v. Irvington*, supra, *Cantwell v. Connecticut*, supra.

The City of Opelika, state of Alabama, has no more authority to require petitioner, one of Jehovah's witnesses, to register with the Commissioners than it would to require the religious priests, religious clergy and religious rabbis of Opelika to register as a condition precedent to giving their sermons and conducting their different religions in the City. It is clearly apparent that such statute cannot be applied so as to interfere with or deprive petitioner of his right of worship. This is the petitioner's way of worship and it cannot be denied because none of the exceptions can be found to exist which would warrant the denial of such right.

The way of worshipping Almighty God as done by the petitioner in this case is commanded by the written law of Almighty God. God's law is supreme. This rule is recognized by Blackstone in his *Commentaries* (Chase 3d ed., pp. 5-7). See also Cooley's *Constitutional Limitations*, 8th ed., p. 968. Petitioner greatly desires to have life and to live, and therefore he must serve Almighty God; for it is written that God is the fountain of life. (Psalm 36:9) One who desires to live must obey God's law. (John 17:3) Petitioner stands in the same position as the apostles of Jesus Christ who, when haled before magistrates and requested to discontinue their preaching the Gospel from house to house, as they did at the time of their arrest, and when ordered to desist, told the court, "We ought to obey God rather than men." (Acts 5:17-42) Thereafter, as it is written concerning them, "daily in the temple, and in every house, they ceased not to teach and preach Jesus Christ." —Acts 5:42.

Should the petitioner cease to proclaim the written judgments of Almighty God by yielding to threats of police officials or for any other reason, he would violate the

agreement previously made by him to obey the law of Almighty God, who commands such proclamation to be made now, irrespective of persecution; and petitioner would thereby subject himself to everlasting destruction, as he verily believes. See Ezekiel 33:8, 9; Acts 3:22, 23.

The petitioner refused to apply for a permit or license because he is an *ordained minister* of Almighty God, preaching the Gospel, and did not come within the provisions of the statute, and furthermore he chose to follow in the footsteps of the Master, Christ Jesus, and His apostles, who preached "publicly and from house to house" and who steadfastly refused to get "permits" from the "state" of their day, and refused to discontinue preaching when requested by the state to discontinue.

It would be an insult to Almighty God to apply to some man of the world, which is ruled over by Satan, for a permit or license to do that which God has *commanded* to be done at the pain of everlasting death for refusal or failure on the part of Jehovah's witnesses to so preach, as He has plainly commanded.

Tested in the light of the standards contained in the cases cited, the ordinance under which the petitioner was convicted cannot stand the test of the Fourteenth Amendment to the Constitution because on its face and as applied in this case there is a clear infringement by "prior censorship" of the press.

Section 4 of the Alabama Constitution provides:

"That no law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write, or publish his sentiments on all subjects, being responsible for the abuse of that liberty."

The ordinance gives the commissioners complete control over the circulation of informative matter throughout

the municipality. It is left to their discretion in granting permission based on its determination of what it considers proper "without notice" to anyone. A prior conviction of any offense would undoubtedly stand as a mark of bad character in the eyes of the Board. An ex-convict selling books on prison reform could be interdicted under the ordinance without any redress. Any local political reformer who published and distributed books on corruption of the local officials in administering their offices would be in the same perilous position.

The provision of this ordinance is very similar to the Irvington ordinance outlawed by this Court in *Schneider v. State* described by this Court as inquisitorial. On authority of *Schneider v. State*, this ordinance should be declared invalid. In the *Schneider* case, Clara Schneider was shown to have done the same work as this petitioner was doing. Clara accepted money contributions for the books, yet this Court held that such conduct on her part did not bring her under the ordinance. The same thing was held in *Cantwell v. Connecticut*, *supra*, also involving one of Jehovah's witnesses doing the same work as petitioner.

No doubt the complaint of some residents annoyed by the petitioner's literature would be considered by the commissioners as ample reason for denial of license. This would be a prohibition of controversial matter. The pamphlets of Thomas Paine, William Lloyd Garrison, Alexander Hamilton, Martin Luther, and others, annoyed many people. It is impossible to circulate information on a disputed issue without annoying someone, but such is the very life of free press and a free country.

The State may not under the guise of 'reasonable police regulation' chisel off liberty of the press by subjecting that to license. The only fields of press activity which may be touched upon by law are (1) immoral and obscene matter, (2) seditious matter, (3) libel of individuals. None of these elements are found in the literature. By no stretch of the imagination can it be said that the literature comes

within any of such limitations. There is nothing immoral or seditious about the literature. The Court of Appeals found that the literature was not immoral and was not seditious. (R. 62)

There is no evidence that petitioner littered the streets with it. There is no suggestion or intimation that he was guilty of disorderly conduct or interference with other people's rights. There is no evidence that he distributed the books or booklets at any unreasonable time. He is not charged with any of such; but even if he was he could not be prosecuted and convicted under this ordinance providing for "license and tax".

Ordinances identical with this one when applied even to "sale of literature" have been held invalid by the courts of the greatest municipality in the world (New York City). See the cases of *People v. Max Banks*, 6 N. Y. S. (2nd) 41, *People v. Samuel Finkelstein*, 2 N. Y. S. (2nd) 941, and cases cited; see also *De Berry v. La Grange* (Ga.), 8 S. E. (2nd) 146, also involving one of Jehovah's witnesses.

Furthermore, it is clear that the activity of the petitioner was activity of the press and was and is such press activity protected by the Constitution. The streets are the natural and proper places for the dissemination of such information (*Schneider v. Irvington*, supra) and this right cannot be denied or abridged on the theory that it can be better exercised elsewhere. The conveniences of the City of Opelika to keep desired conditions on the streets do not warrant licensing or abridgment. (*Schneider v. Irvington*, supra, *Cantwell v. Connecticut*, supra, *Hague v. C. I. O.*, 307 U. S. 496) The duty of the officials to maintain order does not warrant the prior censorship of the press which is permitted by the application of the statute to the facts in this case. *Hague v. C. I. O.*, supra, *Thornhill v. Alabama*, 310 U. S. 88, 95, *Grosjean v. American Press Company*, 297 U. S. 233, *De Jonge v. Oregon*, 299 U. S. 353, 364, *Stromberg v. California*, 299 U. S. 233, *Near v. Minnesota*, 283 U. S. 697, 707.

CONCLUSION

It is therefore submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that errors complained of may be corrected and that to such end a writ of certiorari ought to be granted that this Court review the decision of the Supreme Court of the State of Alabama.

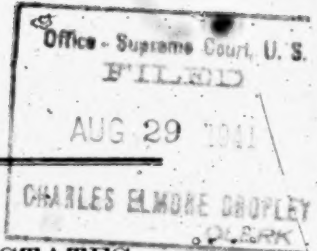
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FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 280

■
ROSCO JONES,
Petitioner

v.

CITY OF OPELIKA,
Respondent

■
On Petition for Writ of Certiorari
to the Supreme Court of Alabama

PETITIONER'S REPLY BRIEF

JOSEPH F. RUTHERFORD
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Attorneys for Petitioners

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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On Petition for Writ of Certiorari
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PETITIONER'S REPLY BRIEF

In answer to the Respondent's Argument, pages four and five of Respondent's Brief in Opposition, under the heading "Jurisdictional", we should like to point out that the judgment of conviction rendered and entered against the petitioner by the Circuit Court of Lee County, Alabama, was affirmed by the Supreme Court of the State of Alabama by reversing the judgment of the Court of Appeals of Alabama. The judgment of the Court of Appeals

of Alabama disposed of the whole case on the merits. The judgment of the Supreme Court of Alabama likewise disposed of the whole case on the merits and directed the Court of Appeals to enter a judgment affirming the Circuit Court's judgment instead of reversing the judgment of conviction and setting it aside, as was done by the Court of Appeals.

Therefore the judgment of the Supreme Court of Alabama directed the Court of Appeals what judgment should be entered and left nothing to the judicial discretion of that Court or the trial court. The courts below have nothing to do but to execute the judgment already rendered.

The cases relied upon by the Respondent are all judgments or decrees of reversal granting leave for further proceedings of the trial court or inferior court. Such judgments are not final in such cases because something yet remained to be done to complete the litigation. In the case at bar nothing remains to be done to complete the litigation and no jurisdictional discretion is required of the courts below to carry out the judgment of the Supreme Court of Alabama. The inferior courts are required only to perform the ministerial act of entering the directed judgment and executing judgment that has heretofore been rendered against the petitioner and thereby to carry the same into execution.

In this respect the case at bar is distinguished from the cases quoted from and cited by respondent.

In this connection, we make reference to *Rio Grande Railway Co. v. Stringham*, 239 U. S. 44, 47; *Board of Com-*

missioners v. Lucas, 93 U. S. 108; *Bostwick v. Brinkerhoff*, 106 U. S. 3; *Mower v. Fletcher*, 114 U. S. 238.

We therefore submit that the judgment of the Supreme Court of Alabama is a final judgment reviewable by this Court, under Section 237 (b) of the Judicial Code [28 U. S. C. A. 344 (b)].

The other matters discussed in Respondent's Brief are fully covered in the Petition for Writ of Certiorari.

Confidently submitted,

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CLERK

SUPREME COURT OF THE UNITED STATES

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UNITED STATES SUPREME COURT

OCTOBER TERM 1941

No. 280

■
ROSCO JONES, *Petitioner*

v.

CITY OF OPELIKA, *Respondent*

■
On Certiorari to the
Supreme Court of the State of Alabama

PETITIONER'S BRIEF

Opinions Below

The opinion of the Alabama Supreme Court is reported in 3 So. 2d 76, and is printed in the record. (R. 3-9) The opinion of the Alabama Court of Appeals is reported in 3 So. 2d 74, and is printed in the record. (R. 62-65) The trial court did not write an opinion.

Jurisdiction

Jurisdiction is invoked under Section 237 (b) of the Judicial Code [28 U. S. C. A. 344 (b)], by petition for writ of certiorari.

Timeliness

The judgment of the state court of last resort (Alabama Supreme Court) was rendered and entered of record on May 22, 1941. (R. 2-3) The petition for writ of certiorari was filed on July , 1941, and within three months from the date of such judgment.

The Statute

The legislation here drawn in question is an ordinance of the City of Opelika, Alabama, in full force and effect at the time of the transaction, with pertinent provisions reading:

"An ordinance to fix and prescribe the rates for license or privilege taxes for trades, vocations, professions, and other businesses conducted within the City of Opelika, Alabama, and its police jurisdiction for the year 1939, and to prescribe certain conditions and provisions for the conduct thereof and to further fix and prescribe certain penalties for the violation of said ordinance.

"Be it ordained by the Board of Commissioners of the City of Opelika, Alabama, that the following schedule of rates for license or privilege taxes for the conduct of any trade, vocation, profession or other business conducted within the City of Opelika and its police jurisdiction for the year beginning January 1, 1939, and ending December 31, 1939, and the following conditions and provisions for the conduct thereof, and the following penalties for the violation thereof be and it is hereby adopted, to-wit: [R. 21]

"Conditions and Provisions

"1. Right of City to Revoke.

"All licenses, permits or other grants to carry on any business, trade, vocation, or professions for which a charge

is made by the City shall be subject to revocation in the discretion of the City Commission, with or without notice to the licensee. [R. 22]

"4. Penalties.

"It shall be unlawful for any person, firm, or corporation or agent of such person, firm or corporation, to engage in any of the businesses or vocations for which a license may be required without first having procured a license therefor, and any violation hereof shall constitute a criminal offense, and shall be punishable by fine not to exceed one hundred (\$100.00) Dollars for each offense and by imprisonment not to exceed thirty days, either or both at the discretion of the Court trying the same; and each day when such business or vocation is conducted without such license shall constitute a separate offense. [R. 22]

"12. Vocations Not Specified Herein.

"Any applicant desiring to conduct any business or vocation other than those specified in this license ordinance shall make application to the President of the Commission, who shall thereon fix a reasonable license for such business or vocation and instruct the Clerk as to the amount so fixed. [R. 24].

"A

"Agents (Annual Only)

Book Agents (Bibles excepted) 10.00

Transient or itinerant agents selling rugs, antiques, goods, wares, merchandise or taking orders for same 25.00

[R. 26]

"N

"Newspapers—Daily, weekly, monthly, or periodical newspapers, or similar publications

(Annual Only) 50.00

"D

"Periodicals—Dealers or newsstands selling or distributing (Annual Only) 5.00

"Peddlers, or itinerant dealers, distributors or salesmen not otherwise included in this schedule (Annual Only) 75.00

[R. 33]

"T

"Transient Agents or Dealers or Distributors of Books (Annual Only) 5.00

"Transient Dealers (Not covered heretofore in this schedule, definition same as transient dealer.) 25.00

[R. 38]"

The Alabama Supreme Court and the trial court (Circuit Court of Lee County) held that the license and tax provided by the ordinance applied to an ordained minister of Jehovah God preaching the gospel of God's kingdom by means of distributing literature explaining Bible prophecies. It was also held that such ordinance on its face and as construed and applied did not unlawfully deny petitioner his rights of freedom of speech, press and assembly and freedom to worship ALMIGHTY GOD, contrary to Section 1 of the Fourteenth Amendment to the United States Constitution. Such courts sustained the applicability of the ordinance to petitioner's conduct and decided in favor of the validity of the ordinance.

Intermediately, the Alabama Court of Appeals, in reversing the trial court, held that the ordinance was not intended to apply to petitioner, an ordained minister of Jehovah God, and that if construed and applied so as to include petitioner it deprived him of aforesaid civil rights contrary to the due process clause of the Fourteenth Amendment.

Statement

Petitioner, one of Jehovah's witnesses, is an ordained minister of Almighty God, preaching the gospel of the Kingdom of Jehovah God, The Theocracy, and as such he is consecrated to bear public witness thereto.

On or about April 3, 1939, on the public streets of the City of Opelika, he was preaching the gospel of God's kingdom by distributing pamphlets explaining present-day application and fulfillment of Bible prophecy. From persons able to contribute a nickel for two of said pamphlets he accepted such contribution, using same to defray cost of publication and circulation.

Petitioner's sole purpose and objective in thus distributing said literature was to preach this gospel, to provide to others the information contained in the literature setting forth this gospel message. His objective was not a commercial one; he was not doing the work for pecuniary gain for himself or for the publishing organization that provided said literature for him to circulate. His inviting and accepting contributions of a nickel for the pair of pamphlets taken by willing recipients was definitely *incidental* to petitioner's primary aim and purpose.

The two pamphlets he distributed were titled, respectively, "Face the Facts" and "Fascism or Freedom", being plaintiff-respondent's Exhibits 1 and 2, respectively. (R. 55-56)

THE FIRST PAMPHLET, "Face the Facts," contains two speeches delivered September 10 and 11, 1938, at London, England, to a visible audience and simultaneously to a vast visible audience by world-wide radio broadcast.

In brief, the speech "Face the Facts" calls for a frank and honest examination of the all-transcending fact that, as shown in God's infallible and inspired Holy Bible, "many centuries ago the Almighty God, who alone is called Jehovah, declared his purpose to set up a righteous government, which shall rule the world in righteousness, in which there

is no unrighteousness, and before which ruling power all human creatures shall stand equal and be given a fair opportunity to gain everlasting life in peace and prosperity."

That the application and bringing to pass of this God-given fact is now opposed by the monstrosity of dictatorial, totalitarian rule by human creatures on earth, seeking *world domination*. As a result, all nations today are in distress, and none of the nations measure up to the perfection and righteousness and everlasting benefit Almighty God promises shall flow to all obedient peoples from His permanent government by Christ Jesus, His King.

That the Bible alone explains satisfactorily the meaning of the disturbing facts of our day, and Christ Jesus foretold the physical facts which have appeared since 1914, and He declared that such meant the end of the rule of Satan and his wicked demons over mankind, which demons are responsible directly for the deplorable conditions on earth and are now invisibly striving to put all mankind in opposition to the establishment of God's kingdom by Christ Jesus, and thereby to bring about the destruction of men and nations. One of the outstanding evidences Christ Jesus emphasized as marking the end of Satan's uninterrupted world rule would be the setting up of an abominable, desolating system of totalitarian rule, which would defy Jehovah God and Christ Jesus as King of the new world. (Matthew 24: 14-17) The facts since 1922 particularly, and which are a matter of historic record, show that the greatest religious organization of "Christendom", and operating out of Vatican City, has had and continues to have dealings with this totalitarian monstrosity and has lined up with its program of *world domination* as against the democracies, including the United States of America, which it aims to bring under its religio-dictatorial rule and control, to the denial of liberties of free speech, press, assembly and worship of Almighty God.

That Jehovah's witnesses, in fulfillment of their covenant with Almighty God and of their commission from

Him, proclaim God's kingdom and its establishment (Matthew 24: 14) and are therefore against this alliance of religion and totalitarian rule, and they expose it and its efforts aimed at depriving free peoples of liberties they hold dear. Hence Jehovah's witnesses suffer great persecution in all nations, especially where that religious system which has lined up with Fascists, Nazis and other totalitarians exercises control over the political and other public servants. This persecution of His witnesses Jehovah God declares He will punish by destroying the persecutors and opposers. Because public newspapers do not call attention to these incontrovertible facts, Jehovah's witnesses do so by all means of publicity, and they warn the religious opposers of their Biblically-announced fate, and also warn the people of good-will toward Almighty God and His King Christ Jesus to flee to and take their stand for the Kingdom of God if they would gain unending life in peace and plenty.

THE SECOND PAMPHLET, "Fascism or Freedom," contains the speech of that title, delivered Sunday, October 2, 1938, in Mecca Temple, New York City, to a large assembly and also, simultaneously, by telephone lines to other assemblies and over a huge network of radio stations throughout the United States, Canada and other countries.

In brief, the speech "Fascism or Freedom" shows that in the light of Almighty God's sure promise recorded in His unerring Holy Bible, to establish His righteous government by Christ Jesus in His own appointed time, the issue now confronting all peoples is one pertaining to their eternal existence; that such issue is: "Shall the world be ruled in righteousness by Christ the enthroned King of Jehovah? or shall it be ruled by selfish, arbitrary dictators?" That the Supreme Being will settle this issue aright, and to His final settlement of this paramount issue Jehovah's witnesses call the notice of all who believe in true freedom and order and righteousness.

That Jehovah's witnesses are non-political; that as faithful ordained ministers, bound in a covenant with Almighty

God to do His will by preaching the gospel of His kingdom; they must publicly call attention of all people to the encroachments of the Fascistic-Nazi-Communistic-totalitarian systems which have arisen in these "last days" and which seek to regiment all peoples to support their vicious rule in opposition to God's announced Government by Christ Jesus, and thus to lead the subdued peoples into the ditch of destruction in the oncoming "battle of that great day of God Almighty" at Armageddon. Hence the totalitarian rule is a product of Satan the Devil, who began such system of world-rule in the days of his visible agent, Nimrod, the first dictator.

That the totalitarian tyrants have sprung up and established themselves in the religious nations of Germany and Italy, and seek to spread their dominating control over all peoples of earth, including America. In this program of conquest those tyrants have the approval and support of the totalitarian system of religion which has its seat at Vatican City in concord with Fascist Italy.

That it is the purpose of said system of religion to destroy American freedom in favor of a Fascist-Nazi-totalitarian combine, in proof of which assertion the speaker-author quotes utterances and writings of several Roman Catholic ecclesiastics, and also sets out the nation-wide acts of opposition committed by Roman Catholic prelates and their "children of the Church" in America against the exercise by Jehovah's witnesses of their constitutionally guaranteed rights and privileges of freedom of expression and of assembly and their freedom to worship Jehovah God as by Him commanded in His Bible and according to dictates of their consciences. That because its opposition to God and His Theocratic Government by Christ Jesus, and also its connivance with the Fascist-Nazi-totalitarian combine, have been exposed, that great religious Hierarchy causes the malicious persecution of Jehovah's witnesses in all lands, marked by particular violence in the United States of America. This is but the initial step in their program of taking

away like rights and liberties from all the rest of the American people. The Hierarchy resents criticism, which is constitutionally allowed and enjoyable in America. Even the policy of the nation's head is frequently criticized by other politicians. "Is the Hierarchy so sacred that it has greater privileges than the president of the United States?" (P. 24) The true Theocracy is Almighty God's administration of world-rule by His King Christ Jesus; whereas the Hierarchy would set up a counterfeit theocracy which is a rule of mankind by dictators under the religious overlordship of the Hierarchy.

That Jesus Christ, foretelling the end of Satan's world rule, warned of the coming of the totalitarian "abomination of desolation", which includes organized religion as a dominant factor, and He foretold its impending destruction by Jehovah God. Hence all persons of good-will toward Almighty God should flee from that "abomination".

NO LICENSE APPLIED FOR

Petitioner did not apply for a license or pay the tax provided for in the ordinance because he regarded himself not covered by the ordinance as one sent by Jehovah God *as an ambassador or minister* to preach said gospel as aforesaid, and believing that his voluntary application for such license or the payment by him of such tax would be an act of disobedience to Jehovah's written commandments concerning His ministers, which disobedience would result in his eternal destruction by Almighty God.

The public method of preaching the gospel employed by petitioner is following exactly in the footsteps of the Lord Jesus Christ, who also taught *publicly* and from house to house.—Luke 8:1; Acts 20:20:

The undisputed evidence showed that the petitioner is not a peddler of goods, wares or merchandise, or a "book agent"—in the sense ordinarily understood or intended by the terms of the ordinance, because he is an ordained min-

ister of Jehovah God, preaching the gospel from house to house and on the public ways.

Two facts are noteworthy here: (1) The ordinance does not list the occupation of "minister". (2) The ordinance expressly exempts 'agents selling Bibles'.

The above facts are undisputedly established in the trial court, and the Court of Appeals so found. R. 62-65, 39-50.

The undisputed evidence also shows that none of the ministers practicing religion in Opelika had been prosecuted under the ordinance for failure to pay the tax or secure a license. This was admitted by respondent when petitioner offered ten of such ministers as witnesses to testify that they had not been called upon to pay the tax or prosecuted under the ordinance for failure to secure a license. R. 51-53.

On April 3, 1939, petitioner was arrested, charged in the Recorder's Court of Opelika with violation of the aforesaid ordinance, and convicted for a violation thereof on such date, fined \$50 and costs and in default of payment thereof was committed to 90 days' hard labor. (R. 11) The conviction was duly appealed from the Recorder's Court to the Circuit Court of Lee County. R. 11.

On November 2, 1939, the case was tried de novo on such appeal and a complaint was filed in said Circuit Court charging petitioner, in four separate counts, with a violation of said ordinance. (R. 12-13) Before evidence was heard on November 2, 1939, petitioner filed his demurrer attacking the ordinance as violating the Federal Constitution. (R. 13-14) At close of the evidence petitioner filed motions to dismiss. (R. 14-16) Said demurrer and said motions to dismiss, duly presented, were overruled by the court and the petitioner was again convicted of the offense as charged, fined the sum of \$50 together with costs of \$103.05.

In due time, form and manner petitioner filed his motion for new trial, complaining of all said rulings. (R. 17-20) Said motion was continued and overruled December 19, 1939. (R. 20) Notice of appeal to Alabama Court of Appeals was duly given. (R. 17) Bill of exceptions containing all the

evidence was approved and filed February 29, 1940. (R. 20-55) Assignment of errors was duly filed in the Court of Appeals. (R. 56-61) The Court of Appeals reversed the conviction and ordered petitioner discharged. (R. 61) Respondent's motion for rehearing was overruled April 22, 1941. (R. 66) Petition for certiorari was duly filed by respondent in the Alabama Supreme Court and same was submitted on briefs May 1, 1941. (R. 1-2) Judgment of the Court of Appeals was reversed and the conviction in the Circuit Court affirmed on May 22, 1941. R. 2-3.

Federal Questions Presented

In the trial court by (1) demurrer filed against the complaint (R. 13-14); (2) motions to dismiss filed during and at the close of the evidence (R. 14-16); and (3) motion for new trial (R. 17-20), the petitioner contended that

- (a) he was an ordained minister and hence not within the provisions of the ordinance, and
- (b) the ordinance as construed and applied deprived him of his rights of freedom to worship Almighty God, freedom of conscience, speech and press, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

These contentions were each overruled by the trial court.

In Alabama Court of Appeals by assignment of errors petitioner duly raised the same contentions: (R. 56-61, grounds "First" and "Sixth") The Court of Appeals sustained each of these contentions, holding that (1) petitioner was an ordained minister and not within the terms of the ordinance, and (2) the ordinance as construed and applied was unconstitutional. (R. 62-65) The Alabama Supreme Court finally passed upon each of said federal questions or assignments, attacking validity of the ordinance, and held

the legislation valid and constitutional, both on its face and as construed and applied. (R. 3-9) Each of the aforesaid grounds has been brought to this court by specific assignment contained in the petition for writ of certiorari, duly and timely filed herein.

Specification of Errors to Be Urged

Petitioner assigns the following errors in the record and proceedings in said cause.

The Supreme Court of Alabama committed reversible error in failing to hold that:

1. The ordinance unreasonably and unlawfully denies and abridges petitioner's right of freedom to worship Almighty God as by Him commanded in His written Word and according to dictates of petitioner's conscience, contrary to the United States Constitution, Fourteenth Amendment, Section 1.

2. The ordinance unreasonably and unlawfully denies and abridges petitioner's right of freedom of press, contrary to the United States Constitution, Fourteenth Amendment, Section 1.

Points for Argument

POINT ONE

Petitioner is not engaged in any of the occupations mentioned in the ordinance and is an ordained minister of Jehovah God, worshiping Almighty God by preaching the gospel of God's kingdom through distribution of Bible literature explaining God-given prophecies; therefore the wrongful misapplication of the ordinance to petitioner deprives him of his right of freedom to worship Almighty God as by Him commanded in His written Word and according to dictates of petitioner's conscience, all contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

POINT TWO

Petitioner is a distributor or circulator of information and opinion, incidentally accepting contributions, and the ordinance on its face and as construed and applied unlawfully deprives him of his right of freedom of press, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

Preliminary Argument Summary

The decision below is based on a false premise; that is to say, that freedom of press extends only to "free" or gift distribution of literature, and that the constitutional safeguard does not protect SALE of literature or the simultaneous distribution and acceptance of contributions to defray cost of publication.

The opinion rests on *Cox v. New Hampshire*, 312 U. S.

569, where right to license a parade on the streets for purpose of "regulating" use of streets was sustained. That case did not hold that *distribution of literature* could be licensed or taxed; but, contrariwise, affirmatively found "that the *distribution of pamphlets* and folders by the groups 'traveling in unorganized fashion' would have had as large a circulation . . . as [when] published by them while in parade . . ." The New Hampshire statute was not a revenue measure.

Manchester v. Leiby, 117 F. 2d 661, is not in point and does not govern here, because it concerned only an ordinance requiring 'identification' and not a permit or license. That *Manchester v. Leiby* opinion is repugnant to the Constitution and applicable opinions by this Court. (See *Herder v. Shahadi*, 14 A. 2d 475, where an identical ordinance was outlawed.) Denial of certiorari (61 S. Ct. 838) does not mean that this Court approved the reasoning or the holding of the First Circuit Court of Appeals. See *United States v. Carver*, 260 U. S. 482, 490.

A minister of the gospel cannot be licensed to perform acts of worship of Almighty God. Furthermore, the ordinance does not mention or contemplate ministers. The constitutional "right" to serve Almighty God cannot be taxed or licensed. It is not a "privilege", but a *right*. As construed, the ordinance licenses acts of worship; that is to say, preaching the gospel by distribution of literature explaining the Bible. To permit such taxing or licensing is authorizing and encouraging an unlawful joinder of "state and church".

The street is the natural and proper place to preach the gospel *in the manner* done by petitioner. The ordinance is not regulatory in nature. The power conferred thereby is the "power to destroy". The taking of contribution when distributing the literature is incidental to petitioner's main activity of preaching the gospel. There are no exceptions shown to exist warranting interference with petitioner's acts of worship by application of the ordinance.

The law of Almighty God is supreme, and when a law of the state requires His minister or ambassador to secure a license as a condition precedent to the doing of what Jehovah commands him to do, the minister must obey God and refuse to apply for the license. If he compromises and secures the license he must suffer everlasting death at the hand of Almighty God.

In such a conflicting situation the Constitution requires that the law yield to conscience of the individual molded by Jehovah God.

Attempt is made to distinguish the ordinance in question from the tax law condemned in *Grosjean v. American Press Co.*, 297 U. S. 233. The ordinance by its terms through licensing "agents," "book agents," "newspapers," "dealers or newsstands selling or distributing periodicals," is directly aimed at *circulation*. The greater the circulation or distribution, the greater the required license fee payments.

The Court will take judicial notice that the big newspapers and national weekly periodicals and magazines are distributed by hundreds of thousands, if not millions, of boys and men on the streets and from house to house in every municipality of the land, and that ordinary distributors of pamphlets and leaflets are poor. There is no difference between proportionately taxing the publishing corporation having the larger circulation and imposing the license tax or fee upon a boy or other person distributing pamphlets or leaflets. The result, regardless of motives, is to discourage, hinder or destroy circulation.

The ordinance is not confined to SALE of literature but requires a license for "free" or gift distribution. The ordinance requires the distributor of the pamphlet, historically the most effective instrument used in establishing freedom of press and liberty for all in this country, to submit to being licensed before distributing literature to further enlightenment, progress and reform in the community.

The claimed intent to raise revenue should not and will

not blind the judicial eye to the effect of the law. To sustain the law would result in retrograde movement toward a licensed press and ultimate suppression of one of the most vital of civil rights, freedom of the press.

On its face and as applied in the case at bar, the ordinance is therefore not a general taxing law for raising revenue, but under the *guise of tax* it licenses "distribution and circulation" of printed information and opinion; hence it strikes at the very foundation of freedom of the press. The fact that it does not provide for prior censorship does not save it.

The law has another equally vicious provision: the unbridled right to revoke without cause at any time the license granted. The tax is arbitrary, discriminatory and unreasonable and has no fixed standard. It is not one of the ordinary forms of taxation for support of government contemplated by the *Grosjean v. American Press* case.

ARGUMENT

POINT ONE

Petitioner is not engaged in any of the occupations mentioned in the ordinance and is an ordained minister of Jehovah God, worshiping Almighty God by preaching the gospel of God's kingdom through distribution of Bible literature explaining God-given prophecies; therefore the wrongful misapplication of the ordinance to petitioner deprives him of his right of freedom to worship Almighty God as by Him commanded in His written Word and according to dictates of petitioner's conscience, all contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

A

Petitioner is an ordained minister of Jehovah God regularly and exclusively engaged in preaching the gospel, and his conduct is an act of worship of Almighty God, Jehovah, not included, either expressly or by inference, within terms of the ordinance.

B

Acceptance of contributions for literature used to preach the gospel is collateral and secondary to the main object of petitioner to preach the gospel.

C

Ambassadors or ministers of Almighty God and Christ Jesus cannot be licensed or taxed by the State for the performance of their duties as such without unlawful and unconstitutional joinder of State and Church.

D

Exercise of the civil right to freely worship Almighty God under the constitutional safeguard cannot be taxed or licensed because the 'power to tax is the power to destroy' the right.

E

The ordinance as construed and applied deprives petitioner of his right of freedom to serve, or worship, Almighty God by informing others through distribution of God's recorded Word and recorded explanations thereof, in obedience to God-given commands and according to dictates of petitioner's conscience.

The Fourteenth Amendment secures to every individual the right of freedom of worship. Freedom of conscience and freedom to choose and adhere to any belief or practice pertaining to the Bible is guaranteed to all. The state cannot

by statute, whether such be a license or a tax statute, deny the right to preach or to disseminate one's views concerning fulfillment of Bible prophecy. *Cantwell v. Connecticut*, 310 U. S. 296.

From the foundation of the United States this country has been recognized and declared by this Court to be "a Christian nation". *Holy Trinity Church v. United States*, 143 U. S. 457. This means that its people endeavor to follow in the footsteps of Christ Jesus. All followers of Jesus Christ are duty bound to obey the law of Almighty God and to follow in the footsteps of His Son, Christ Jesus. (Psalm 40:8; 1 Peter 2:9, 21) Jesus set the only example to follow when He said: "Go ye into all the world, and preach the gospel to every creature." (Mark 16:15) It is written of Him that He went throughout every city and village teaching and preaching the kingdom of God. (Mark 6:6; Luke 8:1) See also Matthew 10:7, 12-14. Jesus and His apostles taught publicly.—Acts 20:20; see also Proverbs 1:20, 21.

A minister of Jehovah God, following in the footsteps of Jesus, is a witness for Jehovah God, viz., one of Jehovah's witnesses. "Ye are my witnesses, saith the LORD [JEHOVAH], that I am God." (Isaiah 43:10-12) Jehovah's witnesses are commanded by Almighty God to preach, as it is written at Isaiah 61:1, 2, to wit: "The Spirit of the Lord God is upon me; because the Lord hath anointed me to preach good tidings unto the meek; he hath sent me to bind up the brokenhearted, to proclaim liberty to the captives, and the opening of the prison to them that are bound; to proclaim the acceptable year of the Lord, and the day of vengeance of our God; to comfort all that mourn."

Jesus said that He came into the world for only one purpose, namely, to bear witness to the truthful promise of Almighty God to set up His Theocratic Government to rule the entire earth in righteousness. (John 18:37) According to Matthew 24:14 Jesus commands His followers thus: "This gospel of the kingdom shall be preached in all

the world for a witness unto all nations; and then shall the end come." Jehovah's witnesses are commanded thus to proclaim His judgments against "Christendom" 'publicly and throughout every city until the cities are desolate'. —Isaiah 6:11.

To enable petitioner thus effectively to preach the gospel publicly upon the streets and throughout the city he uses pamphlets, magazines and books which contain the Bible message. The content of the pamphlets he distributed has been heretofore described. That literature he employs as a substitute for talking or sermons. It is more effective because it can be and is studied by recipients in the quiet of their homes; at their own convenience. Thus much time of both recipient and preacher is saved and more people are served. Petitioner's taking of the contribution is incidental or collateral to the primary aim and purpose to disseminate information to benefit every person willing to receive such.

By all it must be conceded that petitioner is an ordained minister preaching the gospel, and that it was solely because he thus preached that he was arrested and prosecuted. All the courts below found that petitioner was arrested because in *his way* he preached the gospel without securing the required license.

It is admitted that clergymen representing several religious organizations in the City of Opelika have never been required to comply with the ordinance. Freedom of conscience and of worship are not limited to right of establishment, maintenance and use of a building for the purpose of sermonizing or from a pulpit haranguing the people with vain babblings of politics and society. That constitutional liberty includes the right of every inhabitant of this land to teach and practice Bible truths by following in the footsteps of Jesus Christ. From *Watson v. Jones*, 80 U. S. 679, 728, we quote:

"In this country the full and free right to entertain any religious belief, to practice any religious principle,

and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

It is conceded that the activity of petitioner does not violate the laws of morality and property and does not infringe the personal rights of others. To permit the application here of the Opelika ordinance will change the above rule, and thus violate the Constitution.

Jehovah's witnesses are not peddlers within the meaning of the ordinance, and are not required to register under the tax-licensing and permit ordinances of any municipality. In *Thomas v. City of Atlanta*, 1 S. E. 2d 598, it was held:

"We do not think it is the duty of an ordained minister of the gospel to register his business with the city. Neither is it peddling for such minister . . . to sell or distribute literature dealing with his faith . . ."

In *Cincinnati v. Mosier*, 22 N. E. 2d 418, a similar licensing ordinance was wrongfully applied to another of Jehovah's witnesses, and in setting aside that conviction the court said:

"The ordinance . . . can have no more application to the defendant . . . than it could if it were attempted to apply it for an act performed outside the state, county, or city."

In *Semansky v. Stark*, 199 So. 129, the peddlers' licensing statute of Louisiana was applied to the work of Jehovah's witnesses. That state's Supreme Court, in setting aside the conviction, said:

"In view of the nature of these transactions we are of the opinion that the Legislature did not intend to

require those engaged in disseminating the doctrines and principles of any religious sect, either by the distribution, or sale, of books or pamphlets pertaining to such, to pay a peddler's license, or to classify them as peddlers."

Similar conclusions have been reached in other cases involving Jehovah's witnesses.

State (South Carolina) v. Meredith (1941),
15 S. E. 2d 678

Reid et al. v. Borough of Brookville [Pa.] et al.
(1941), 39 F. Supp. 30

Donley et al. v. City of Colorado Springs (1941),
40 F. Supp. 15

Kennedy et al. v. City of Moscow [Idaho] et al.
(1941), 39 F. Supp. 26

Zimmermann et al. v. Village of London (Ohio)
(1941), 38 F. Supp. 582

Douglas et al. v. City of Jeannette [Pa.] et al.
(1941), 39 F. Supp. 32

To permit or to encourage the application of this type of ordinance to the activity of preaching the gospel is to allow the state to *regulate the church*, which would ultimately permit politicians and others to establish through the state a *state religion*, or through license or taxation to suppress and destroy freedom to worship Almighty God. This would be effected by licensing or taxing the followers of Jesus Christ. Thus the people of America would be pushed back into the miserable condition of intolerance, lethargy and indolence of the dark ages from which founders of this "land of liberty" fled during the reign of King George III. All *tendencies* to accomplish a joinder of "church and state", either directly or indirectly (as attempted here), should be "nipped in the bud". The sedulous avoidance by America of any move toward joinder of "church and state" is dis-

cussed in *The Encyclopedia Americana*, Vol. 6, pp. 660, 657-659; and in the *Columbia Encyclopedia* (Columbia University Press). See *The Catholic Encyclopedia*, Vol. 14 (1912), pp. 250-253.

Petitioner refused to apply for a license because he regarded himself as sent by Jehovah God to do His work and believes that such application *by him* would be an act of disobedience to Jehovah God that would result in his (petitioner's) everlasting destruction. R. 4, 62.

God's law and the requirements of the covenant into which He has taken His ministers, such as petitioner, are supreme. (Blackstone, *Commentaries*, Chase 3d ed., pp. 5-7) Neither human creatures nor human powers can set aside the requirements of the law of Almighty God, nor prevent the individual conscientiously to obey the God-given mandate. Nor can such prevention be accomplished by mob violence or by laws mischievously framed or misapplied by men. (Cooley, *Constitutional Limitations*, 8th ed. p. 968) When confronted with inconsistent demands of the two, Jehovah's servants adopt the answer provided by Him, to wit, "We ought to obey God rather than men." (Acts 5:29) They desire life, which comes only from Almighty God to those who are wholly obedient to His law. (Psalm 36:9; John 17:3) "The law of [Jehovah] is perfect, . . . the statutes of [Jehovah] are right, . . . the commandment of Jehovah is pure."—Psalm 19:7, 8.

Jehovah's witnesses are ambassadors for Jehovah's Theocratic Government under Christ. (2 Corinthians 5:20; Ephesians 6:20; see also Jeremiah 49:14; Obadiah 1) Hence the State does not have jurisdiction to intervene by application of law or otherwise to encumber, regulate or interfere with the carrying out of their mission as such ambassadors *in the manner* directed by Almighty God, Jehovah. Consequently petitioner cannot apply for a permit or license without violating his conscience and the covenant which binds him to perform the commands of Almighty

God. Jehovah says that covenant-breakers are worthy of death. (Romans 1:31, 32) Furthermore, petitioner cannot discontinue preaching the gospel as commanded by Almighty God, and he must continue irrespective of persecution, or otherwise suffer everlasting destruction at the hand of the Most High God, whom he has agreed to obey. (Ezekiel 33:8, 9; Acts 3:22, 23; Jeremiah 26) The law of Jehovah never changes. (Malachi 3:6) He saves those who love and serve Him, but all the wicked He will destroy. (Psalm 145:20) Jehovah keeps all His promises.—Isaiah 46:11.

It would be an insult to Almighty God for one of His servants to apply to another human creature for a permit or license to do that which God has commanded His servant to do under pain of everlasting death for refusal or failure so to do.

Solicitation of funds for a religious cause cannot be taxed or licensed. *Cantwell v. Connecticut*, supra.

Distribution of literature containing information and opinion cannot be licensed. *Schneider v. State*, 308 U. S. 147; *Lovell v. City of Griffin*, 303 U. S. 444.

The ordinance specifically exempts 'agents selling Bibles'. Clearly this extends by implication to literature explaining the Bible. The fact that Opelika clergymen acting for various religious organizations are not taxed under the ordinance is proof of this conclusion.

It is submitted that the ordinance as construed and applied denies and abridges petitioner's right of freedom to worship Almighty God, contrary to the Fourteenth Amendment, Section 1; and, therefore, the judgment of the Supreme Court of Alabama should be set aside for this reason.

POINT TWO

Petitioner is a distributor or circulator of information and opinion, incidentally accepting contributions, and the ordinance on its face and as construed and applied unlawfully deprives him of his right of freedom of press, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

A

The ordinance on its face unlawfully and unreasonably discourages, hinders and restricts circulation and distribution of pamphlets and other literature containing information and opinion when, incidentally to distributor's main purpose, contributions are accepted by him to defray cost of distribution.

B

The ordinance is void on its face because it restricts and prohibits *free* distribution of pamphlets and other literature containing information and opinion.

C

Exercise of the CIVIL RIGHT of "press activity", as distinguished from exercise of PRIVILEGE competitively to transact commercially gainful business, cannot be licensed or taxed because to permit is to confer the 'power to destroy' the CIVIL RIGHT.

D

The ordinance in question is not regulatory in its aim and nature and is not a general taxing law contemplated by the United States Supreme Court in *Grosjean v. American Press Co.*, and is distinguished from decisions relied upon by respondent.

E

The license tax is arbitrary, discriminatory and unreasonable and has no fixed standard.

F

The ordinance on its face and as construed and applied unlawfully denies and abridges petitioner's right of freedom of press.

The Fourteenth Amendment secures to all freedom of the press, against abridgment by the State.

This right and liberty are not confined to printing, but also embrace the right to distribute, to circulate printed informative matter, to disseminate ideas in recorded form. Liberty of circulation is as essential as liberty to print; indeed, without circulation publication would be of little, if any, value. *Ex parte Jackson*, 96 U. S. 727, 733; *Lovell v. City of Griffin*, 303 U. S. 444; *Grosjean v. American Press Co.*, 297 U. S. 233.

The undisputed evidence and the findings of all the courts below show that petitioner is engaged in activity of "the press".

The primary activity of petitioner was distributing and circulating the two pamphlets, "Face the Facts" and "Fascism or Freedom", which related to present-day problems of great importance and pertaining to government as viewed from the Bible standpoint. To aid in printing and distributing more like literature, so as to carry forward his work, a small contribution of five cents for both pamphlets was received by petitioner. The police testified that petitioner "sold" the pamphlets. Petitioner denied that he "sold" but said he took a "contribution". The difference implied by these terms is not material, inasmuch as the undisputed evidence shows that petitioner was engaged in a benevolent, non-profit, non-competitive enterprise for others' welfare.

and that he did not engage in such activity for private gain or profit, or as carrying forward a commercial venture in competition with established local merchants or business.

It is clearly evident that to hold that the constitutional shield protecting freedom of press covers only "free" or gift distribution of pamphlets and other printed informative material is to sound the death toll for that most vital of constitutional rights in this country.

Such a doctrine is foreign to American jurisprudence. It is contrary to the fundamental principles of liberty so jealously guarded by the founders of this nation. To thus hold is to make liberty of the press the prerogative of the rich, the well to do, and to deny that right to the poor and less fortunate. See *Hannan et al. v. City of Haverhill et al.*, 120 F. 2d 87; *Commonwealth [Pa.] v. Reid et ux.*, 20 A. 2d 841. Both of those cases involve activity of Jehovah's witnesses wrongfully charged under similar ordinances.

In *Commonwealth v. Reid*, supra, the ordinance of the Borough of Clearfield was very similar to that of Opelika. After quoting from *Lovell v. City of Griffin*, supra, President Judge Keller said:

"The historical reference to 'pamphlets' in that [*Lovell*] opinion and in other opinions of that Court (*Schneider v. State* (Town of Irvington), supra, p. 164; *Thornhill v. Alabama*, 310 U.S. 88, 97; *Grosjean v. American Press Co.*, 297 U.S. 233, 245-250, etc.) is not limited to 'pamphlets' which are distributed without cost. Every student of history knows that the 'pamphlets' referred to by Chief Justice Hughes in his opinion, and by Mr. Justice Sutherland in the *Grosjean* case, were not for the most part circulated *gratis*, but were distributed to subscribers or sold."

See, also, *The Encyclopædia Britannica*, Vol. 20, Pamphlets, pp. 659-660.

In the case at bar, the license tax provided for, as applied, is not all different from the tax struck down in the case of *Grosjean v. American Press Co.*, supra. There the tax was based on gross receipts of the newspaper with circulation over 20,000 copies per week. Here the ordinance provides for a license on "Newspapers" operated in the city. (R. 33) It also provides for license tax fee for dealers in periodicals and newsstands selling periodicals, and for license tax for agents selling merchandise. (R. 26, 33) Pamphlets, periodicals and newspapers are included within the meaning of the term "merchandise" by the trial court and Alabama Supreme Court. Local and transient agents or dealers in books are likewise licensed. R. 38.

It is a well-known fact (of which this Court will take judicial notice) that the principal method of circulation and distribution of the large newspapers and national periodicals and magazines, weekly and monthly, is by newsboys and men, both on the streets and from house to house throughout the entire nation. This is particularly true with respect to sale of magazines such as "Collier's", "The Ladies Home Journal", "The Saturday Evening Post" and "Liberty". This has been the principal means of distribution of pamphlets, especially since their original use and to this day.

While casual consideration might lead one to believe that the ordinance in question is one of the 'ordinary forms of taxation for support of the government', yet a more careful consideration thereof conclusively shows that it is adroitly aimed, whether unwittingly or deliberately, at circulation and can be misused to utterly destroy distribution of literature containing information and opinion.

A case directly in point, decided November 5, 1941, involving four of Jehovah's witnesses, was prosecuted under an identical license-tax ordinance of the City of Rutland, Vermont. It is styled *State of Vermont v. Greaves* (and three others), ... A. 2d ... There the Vermont Supreme Court said:

"... respondent, Elva Greaves, is charged with a violation of section 22 of chapter 21 of the Rutland City ordinances as amended. Briefly stated, the offense alleged is that on, to wit, the 19th day of April, 1941, at the City of Rutland, the respondent did 'carry on the business of "peddler" by selling pamphlets for money without obtaining a license from said City of Rutland so to do, ...' Trial was by jury in the Rutland Municipal Court, a verdict of guilty returned, judgment entered thereon and the case is here upon exceptions by the respondent.

"The parts of the ordinance in question which are here material are as follows: 'No person shall carry on the business of ... peddler ... within the city, ... without first obtaining a license therefor as provided in this chapter, ...'

"... respondent's motion for a directed verdict was upon the grounds that she was not a peddler, but did disseminate teachings of the Bible by distributing books, booklets, pamphlets and magazines for which she received money contributions; that the undisputed evidence shows that she is not guilty and also upon the grounds that the ordinance in question as applied to her is contrary to the provisions of both the Federal and State Constitutions in that she has thereby been deprived of her rights as to freedom of speech, freedom of press and freedom of right to worship Almighty God. ...

"The respondent is an ordained minister of a ... class ... designated as 'Jehovah's witnesses'. As such she believes that she is commanded by the Almighty to spread the Gospel as she and other members of this organization believe it to be and that it is her duty to do so. She did this by publicly taking positions on the sidewalks and streets in the City of Rutland, equipped with a magazine bag and several magazines known as the 'Watchtower' and 'Consolation'. As people passed

she would call out some statement referring to religion and if any person gave attention and wished a magazine she sold it to him for five cents which was no more than enough to cover the cost of publishing same. She sold several of these in this manner on the day mentioned in the complaint. The object of this distribution of magazines was to place in the hands of the people in general true Biblical teachings as she understands them and believes them to be and not for the purpose of any financial gain or material personal benefit whatsoever. She had no license from the City of Rutland to carry on therein the business of peddler.

"Section 24 of this ordinance provides that the fee for a peddler's license shall be from \$10. to \$200., depending upon the manner of travel of the applicant and the capacity of the vehicle used to transport the goods he desires to sell.

"There is no claim that the printed matter in the magazines in question was obscene or otherwise objectionable. . . .

"Whether the license fee with which we are concerned is considered as a license fee or a license tax, its effect upon circulation of these magazines is the same in either case. In considering the constitutional question here this ordinance must be tested by its operation and effect rather than by its form. *Near v. State of Minnesota*, 283 U. S. 697, 708; *Henderson v. Mayor*, 92 U. S. 259, 268. Therefore what is stated by the United States Supreme Court in the case of *Grosjean v. American Press Company*, 297 U. S. 233, . . . has great weight in determining the question in the case at bar. . . .

"Freedom of the press secured to the people of the United States by the First and Fourteenth Amendments to the Constitution applies not only to printed matter circulated without charge to the recipients but

it also *applies when a charge is made for it*. Grosjean v. American Press Co., *supra*; Lovell v. City of Griffin, *supra*.

"It is true as the State contends that within limits permitted by law a municipality may enact regulations in the interest of public safety, health, welfare or convenience. Therefore, we now come to the question as to whether this ordinance as applied to the facts in this case is a valid regulation.

"In every case this power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the freedom protected by the United States Constitution. Cantwell v. State of Connecticut, 310 U. S. 296; Schneider v. State (Town of Irvington, N. J.) 308 U. S. 147.

"As applied to the facts in this case this ordinance *makes no provision regulating the manner of carrying on the business of peddlers within Rutland City*. The respondent having paid \$10 and so *obtained a license would then have been free to peddle these magazines in the City of Rutland at any time, in any place, and in any manner, wholly unrestricted by any provision in the ordinance*. In short, her freedom to peddle these magazines there would be as complete as though the ordinance did not exist. To enforce the terms of this ordinance under the circumstances of this case would be to *compel the respondent to pay a fee of \$10 in order that she might avail herself of a privilege secured to her by the United States Constitution*. Also that this requirement of the ordinance, if enforced here, would operate as a *restraint upon the circulation of the magazine in question is too plain to need further discussion*. Grosjean v. American Press Co., *supra*. It follows that as applied to the facts here this ordinance *cannot be justified as a valid regulation*. Grosjean v. American Press Co., *supra*; Cantwell v. Connecticut, *supra*; Lovell v. City of Griffin, *supra*.

"The only question presented here and therefore the only one considered is the application of this ordinance to the facts in this case. The fact that when so applied the ordinance is unconstitutional does not determine that it would be invalid for that reason when applied to other and different facts. *Whitney v. People of the State of California*, 274 U. S. 357, 378; *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289.

"We hold that this ordinance as applied to the respondent under the circumstances shown by the evidence in this case is unconstitutional because when so applied it *abridges rights of the respondent* as to freedom of the press secured to her by the First and Fourteenth Amendments to the United States Constitution.

"Judgment reversed and the respondent is discharged." [*Italics added*]

Here, too, the burden is imposed upon the "distribution" or "circulation" end of publication which, under the constitutional protection, is intended to be left unhampered and unrestrained by all forms of license and permit laws. Under the Opelika ordinance, however, every newsboy or other person distributing any pamphlet, book or periodical is required to pay the license fee. The license fee imposed is *not for the purpose of regulating* and paying necessary expense incidental to use of the streets, as was the *parade* license fee in *Cox v. New Hampshire*, 312 U.S. 569. There the fee collected was used in providing policing of *parades*. Here, however, no such aim or purpose exists. Here, ostensibly, the object appears to be *revenue raising*, but, really, the aim, purpose and *effect* or result is destruction of distribution or circulation, because the burden of tax is placed on the distributor.

Suppose a citizen interested in good government found that a particular administration of officials in Opelika were corrupt and incompetent, and he desired to print a pam-

phlet making known such fact for the purpose of effecting a change of administration. If he prepared such a pamphlet and distributed it, either *gratis* or for a small charge, he would be required to get a license, and on failure to do so could be prosecuted and convicted.

Let us assume that the Nazis and Fascists were moving in secret to invade the Gulf shore of Alabama, and some good citizen learning this fact printed millions of pamphlets or leaflets for distribution throughout Alabama. In Opelika, under this ordinance, both he and every loyal citizen aiding him to distribute such printed matter could be convicted for their failure to pay the tax and secure a license. A modern-day Tom Paine or John Milton could not safely function with his pamphlets in the City of Opelika.

The tax here in question directly encumbers and smothers distribution and circulation of literature; and if held to be valid, it could be used to destroy circulation. This is plain enough when we consider that if it were increased to a high degree, as it could be (*Magnano Co. v. Hamilton*, 292 U. S. 40, 45, and cases cited), it well might result in completely suppressing both distribution and even publishing to point of destruction.

As our further argument we here adopt in its entirety the opinion of Mr. Justice Sutherland in *Grosjean v. American Press Co.*, 297 U. S. 233, 244-251, and also the statement appearing in *Near v. Minnesota*, 283 U. S. 697, 707-716 et seq.

The ordinance is clearly *not regulatory*. The license tax provided for is not a general taxing law for support of government as contemplated by this Court. The ordinance throws the burden upon the pamphleteer or other distributor of limited means and thus stops circulation. A thousand distributors would be required to pay, from \$5,000 to \$25,000 to function under the ordinance. Under the same ordinance the one printer for the thousand distributors would be required to pay only \$50. The unreasonableness of the ordinance license tax is manifest.

We submit that the ordinance as construed and applied and also, by express provisions, on its face violates the Fourteenth Amendment by reason of denial and abridgment of freedom of press. The decision of the Alabama Supreme Court is contrary to the following decisions and opinions of other courts, to wit:

Schneider v. State,
308 U. S. 147

Lovell v. City of Griffin,
303 U. S. 444

Grosjean v. American Press Co.,
supra

Donley et al. v. City of Colorado Springs,
40 F. Supp. 15

Zimmerman et al. v. Village of London (Ohio),
38 F. Supp. 582

Kennedy et al. v. City of Moscow (Idaho),
39 F. Supp. 26

Hannan et al. v. City of Haverhill [Mass.] et al.,
120 F. 2d 87

Reid et al. v. Borough of Brookville [Pa.] et al.,
39 F. Supp. 30

Commonwealth [Pa.] v. Reid et ux.,
20 A. 2d 841

State [Fla.] ex rel. Hough v. Woodruff,
2 So. 2d 577

State [Fla.] ex rel. Wilson et al. v. Russell,
1 So. 2d 569

Village of South Holland [Ill.] v. Stein,
26 N.E. 2d 868; 373 Ill. 472

In each of the above cases the identical activity of Jehovah's witnesses was involved and the challenged ordinances and statutes were held to be unconstitutional both on their face and as construed and applied, because unlawfully abridging the right of freedom of press.

This Court can take judicial notice of the clearly reasoned opinion of a humble city magistrate of this nation's largest and *greatest* municipality, involving an identical ordinance. Very early New York City's Magistrate Morris Rothenberg discerned and applied the American principles so ably set forth by Chief Justice Hughes in *Lovell v. Griffin*, supra. In *People v. Max Banks* (July 20, 1938), 6 N. Y. S. 2d 41, Judge Rothenberg said:

"I hold it to be an infringement of the First and Fourteenth Amendments to the Constitution of the United States guaranteeing liberty of the press to require the payment of a license fee for the privilege of *selling a pamphlet on the public streets* and to impose a penalty of fine and imprisonment for violation of the section mentioned.

"In applying the principle laid down in the *Grosjean* case to the facts in the *Lovell* case the Chief Justice said:

"The ordinance cannot be saved because it relates to distribution and not to publication. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." . . . The license tax in *Grosjean v. American Press Company*, supra, was held invalid because of its direct tendency to restrict circulation."

"Following this reasoning it is clear that the imposition of a license fee or tax as a prerequisite to the *sale of pamphlets on the streets* has a direct tendency to restrict circulation, notwithstanding the fact that

Article 6 of the Administrative Code [City of New York] permits free distribution of literature *on the public streets without restriction*. Free circulation depends as much and conceivably more upon the sale than upon free distribution, considering the cost involved in the free distribution of literature. Adequate circulation may only be rendered possible through *sale* defraying the cost of production. How effectively a license fee or tax may act as a curtailment upon *sale* and consequently upon circulation the Supreme Court in the Grosjean case said becomes plain when we consider that if the tax were increased to a high degree, as it could be, if valid . . . it well might result in *destroying circulation*.² [Italics added]

In *People v. Finkelstein*, 2 N. Y. S. 2d 941, also it was held that license tax ordinances of the City of New York very like the license ordinance of Opelika were unconstitutional as construed and applied to street distribution of literature.

Here the case of *Thomas F. Stein, Jr., doing business under the name and style of Stein Brokerage Co., v. Alabama* (. . . U.S. . . ., 61 S. Ct. 838, 29 Ala. App. 565, 199 So. 13), relied on by the Alabama Supreme Court, is not in point, because *it did not involve the right of freedom of press*. Pointedly, however, in *Schneider v. State*, supra, this Court said:

" . . . Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at *other personal activities*, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." [Italics added]

In *Hannan et al. v. City of Haverhill et al.*, supra, the Federal First Circuit Court of Appeals said:

"... Restrictions properly applicable to hawkers and peddlers selling ordinary articles of merchandise on the streets might not be appropriate to regulate the sale and distribution of literature of the sort offered for sale by the plaintiffs." [Italics added]

Streets are the natural and proper places for dissemination of printed information and the consistently free exercise of the individual's right of press activity. *Schneider v. State*, supra; *Hannan et al. v. City of Haverhill et al.*, supra. See, also, *Hague v. C. I.O. et al.*, 307 U. S. 496; *Thornhill v. Alabama*, 310 U. S. 88, 95.

There is no claim that petitioner blocked traffic, littered the streets, or that he was guilty of breach of the peace or disorderly conduct or interference with other people's rights while distributing the literature. There is no claim that he operated at any unreasonable time; nor that he disseminated literature of obscene or otherwise hurtful content. He is not charged with any such improper conduct; but even though he were so charged, he could not be prosecuted and convicted under the licensing ordinance in question; for if guilty, in fact, of such improper conduct he can rightly be prosecuted only under statutes specifically prohibiting such offenses.

Giragi et al. v. Moore et al., 58 P. 2d 1249, 64 P. 2d 819, 301 U. S. 670, is not in point because there the tax involved was a general sales tax of one percent of gross proceeds of sales or gross income of business of everyone in the state. The tax was a general income or sales tax and was not a tax on newspapers, pamphlets or other printed informative material, and was not, as here, a tax on distribution or circulation.

This statement also applies to *Arizona Pub. Co. v. O'Neil*, 22 F. Supp. 117, 304 U. S. 543, involving the same law as was involved in *Giragi v. Moore*, supra. It is manifest that the tax or license in question is much different from the Opelika tax on distributors of pamphlets.

Associated Press v. N. L. R. B., 301 U. S. 103, 133, is not in point because there the only question was that of duty of publisher to comply with labor rate of pay for employees, which is within the exception announced in the *Grosjean* case.

The case of *Reuben R. Donnelley, etc. v. City of Bellevue*, 140 S. W. 2d 1024, did not relate to the distribution of printed informative material but was confined to regulation of commercial circulars advertising competitive sale of ordinary articles of merchandise, peddling and sale of which merchandise can rightly be regulated under proper, non-discriminatory ordinance. Thus that case is distinguished. Here, however, we submit incidentally that *freedom of press* extends equally to the *commercial* world and to the *political* world, or sphere, as it does to the *ecclesiastical*, i. e., "spiritual" or "religious". Really, the holding in the *Bellevue* case, *supra*, is not sound law. That holding even if good law, is not in point or controlling here and should be disregarded.

Conclusion

In today's perilous hours men's hearts are failing them for fear of what they see coming upon the human family. This great fear has driven rulers and judges of every land into desperation and perplexity, resulting in a breaking down of justice and morality. Notwithstanding the turbulence and the unparalleled strains and stresses of these momentous hours,

"a court in the discharge of duty under our system is required to be oblivious to public clamor, partisan demands, notoriety, or personal popularity and to interpret the law fearlessly and impartially so as to promote justice, inspire confidence and serve the public welfare. . . . The perpetuity of democracies has as a foundation an informed, educated and intelligent citi-

zenry. An unsubsidized press is essential to and a potent factor in instructive information and education of the people of a democracy, and a well informed people will perpetuate our constitutional liberties." (Chapman; J., concurring specially, in *State [Fla.] ex rel. Wilson et al. v. Russell* [April 8, 1941] 1 So. 2d 569.)

See, also, "Freedom of the Press" (C. A. Peairs, Jr.), 28 Ky. Law Journal (May 1940) 369-410, an arresting review of the vital questions, concluding:

"[pp. 409-410] ... With the exception of a few noble liberals, who believe that 'liberty of the press means liberty for those with whom we disagree' [FOOTNOTE 126: "Felix Frankfurter, 37 Har. L. Rev. 1029, following the Holmes approach."], the sides taken in questions of this sort depend on whose ox is being gored. ... The First Amendment, and allied provisions, may be mere nebulae in times of comparative natural harmony, but when the mind of a nation becomes aroused against a small minority, they do their greatest work."

During these hectic days a gigantic wave of prosecutions and persecutions against Jehovah's witnesses has swept over this "land of the free and home of the brave". Why? Sophistry and fine reasoning, without sound foundation, have subtly drawn many of the lower courts into the erroneous, un-American position of approving judgments of conviction denying liberty of conscience, of thought, of speech and of press, under the pretext or motive of 'safeguarding national defense interests'. Blind to the ultimate result of such short-sighted and hasty conclusions, such zealous but panicky members of the judiciary have unwittingly dragged segments, at least, of this nation closer to the brink of totalitarian rule.

The only factor which distinguishes this country as a republic with a democratic form of government, and there-

fore the only thing worthy of preservation from totalitarian aggression, is that American heritage epitomized as the "Bill of Rights". Once the freedom anchored and secured thereby is gone, the reason is lost for fighting Nazism and allied totalitarian tyranny.

In this hour of emergency even more than in times of peace there rests upon this nation's courts and jurists—from the lowly magistrate to the Chief Justice—a *higher* duty to scrutinize, to weigh, to appraise the 'substantiality of reasons adroitly advanced in support of *regulation* of free enjoyment of fundamental personal rights', so as to guard against any and all encroachments. Why? The danger of loss, total and permanent loss, in such times as these is intensified a hundredfold.

Here, then, let deepest consideration be given to the *effect* of the challenged ordinance rather than merely to the cold black and white text of its provisions.

Before exercising its regal and judicial power, which is final, let this tribunal, the last bulwark of liberty, consider its own profound expression in another trying hour, in *Ex parte Milligan*, 4 Wall. 2, 120 (1866); and also the later dissenting words of Mr. Justice Sutherland:

"Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship . . . ? If so, let them withstand all *beginnings* of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."

Associated Press v. N. L. R. B., supra

Finally, we say that the judgment of the Supreme Court of Alabama should be reversed and the judgment of the

Alabama Court of Appeals affirmed, setting aside the conviction of petitioner in the Circuit Court of Lee County and discharging him with his costs.

Confidently submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

No. 280

ROSCO JONES, *Petitioner*

v.

CITY OF OPELIKA, *Respondent*

**On Certiorari to the
Supreme Court of the State of Alabama**

PETITIONER'S REPLY BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

No. 280

■
ROSCO JONES, *Petitioner*

v.

CITY OF OPELIKA, *Respondent*
■

On Certiorari to the
Supreme Court of the State of Alabama

PETITIONER'S REPLY BRIEF

MAY IT PLEASE THE COURT:

Respondent manifestly has fallen into the same pit of error as did the trial court and the Alabama Supreme Court when considering the issues involved as a result of an unsuccessful attempt to jump the broad gap between—

- a) police power authorizing taxation, license and regulation of sale of ordinary articles of merchandise upon the streets or from house to house, and
- b) the occupation or activity of distributing on streets or at homes of the people literature containing information and opinion (simultaneously inviting and accepting money contributions to aid such work), protected by the Constitution against all sorts of State encroachment.

This gap between the two cannot be bridged or leaped over by law.

Respondent's entire brief is based upon the false premise that there is no distinction between "selling" *literature* and selling ordinary articles of merchandise.

It is also based on the assumption that the license tax here is one of the ordinary forms of taxation for support of government, when, as a matter of fact, the ordinance, on its face and as construed and applied, constitutes and is a *direct burden through license tax* upon circulation and distribution—the very life of "freedom of the press".

Such underlying false premises invalidate respondent's argument as a whole. Thereby this Court is relieved of the need to weigh the contentions and distinctions stressed in respondent's brief.

In all fairness to this Court, and in the interest of aiding the Court to protect the people of this land from every subtle assault against civil liberties such as that made in respondent's brief under the guise of protecting the power of government tax, we submit the following:

Respondent's Technicalities

Jurisdiction of this Court is questioned *again*, and *erroneously*, by respondent. Brief, pages 2, 5, 7-15.

It is extremely difficult to understand how respondent can seriously say that the judgment of the Alabama Supreme Court is not a final judgment. That contention of respondent is contradicted by the record, the history of the case, and the authorities heretofore presented by petitioner.¹

Respondent cites and quotes from *Box v. Metropolitan Life Ins. Co.*, 168 So. 217 (Respondent's Brief, page 14), and argues that the case was sent back to the Alabama Court of Appeals for consideration of other assignments of error. This is not true, and the face of the judgment and record does not support respondent.

In the Alabama Court of Appeals, by brief and argu-

¹ See petitioner's brief in reply to respondent's brief in opposition to the petition for a writ of certiorari, dealing exclusively with this question. See, also, *Clark v. Willard*, 292 U. S. 112, 118; *Mower v. Fletcher*, 114 U. S. 127.

ment, appellant urged only two points supported by two specifications of error. These points are identical with the ones urged here. No other specifications or assignments of error were considered by the Court of Appeals. Therefore under the Alabama procedure the highest and intermediate appellate courts cannot consider assignments of error not briefed.² Assignments of error not briefed are specifically waived.³

We submit that had the Alabama Supreme Court concluded that the other assignments of error were required to be considered by the Court of Appeals, it would have said so expressly, as it did in the *Box* case, supra. The question of jurisdiction in this case is controlled and governed by *Clark v. Williard*, 292 U. S. 112, 118. The judgment and opinion of the Alabama Supreme Court terminated the litigation between the parties on the merits of the case "so that if there should be an affirmance [in the Supreme Court], the court below would have nothing to do but to execute the judgment or decree it had already rendered." *Georgia Ry. & Power Co. v. Decatur*, 262 U. S. 432, 437.

On the strength of the Alabama Supreme Court's decision in the case at bar, the Alabama Court of Appeals affirmed the conviction of Thelma Jones, wife of petitioner, in a companion case where the assignments of error and the facts were identical. See *Thelma Jones v. City of Opelika*, 3 So. 2d 923. Thus it is apparent that the judgment in the instant case was considered a final judgment.

Because respondent is either blind to the law governing the question of what constitutes a "final judgment", or

² Rule 10, Alabama Supreme Court Rules (1940 Code of Alabama, Title 7, pages 1008, 1009); *Bartfield v. Bartlett*, 23 Ala. App. 9, 119 So. 696; *Jones v. Stollenwerck*, 218 Ala. 637, 640, 119 So. 844; *Conway v. Robinson*, 216 Ala. 495, 497; 113 So. 531; *East Pratt Coal Co. v. Jones*, 16 Ala. App. 130, 131, 75 So. 722, certiorari denied, *Ex parte East Pratt Coal Co.*, 200 Ala. 697, 76 So. 995.

³ *Louisville Ry. Co. v. Holland*, 173 Ala. 675, 682 (point 7), 55 So. 1001; *Vernon v. Wedgworth*, 148 Ala. 490, 494 (point 4), 42 So. 749; *Harper v. Ralsen Fertilizer Co.*, 148 Ala. 360, 363 (point 4), 42 So. 550; *Western Union Tel. Co. v. Emerson*, 14 Ala. App. 247, 249-250 (point 1), 69 So. 335; *Hamilton v. Cofield*, 220 Ala. 44, 124 So. 91.

is not serious, we answer the argument without further discussion, by saying, now we are more certain and confident than before certiorari was granted, that the judgment of the Alabama Supreme Court is final and that this Court has jurisdiction.

Regardless of the dilemma in which respondent discovers itself, its tenacious efforts to cut this Court off from considering the merits, by arguing this point, should be rejected as frivolous and without merit.

Merits

Naïvely respondent asserts that it cannot be said that petitioner is an ordained minister preaching the gospel, and that it was not solely because he thus preached that he was prosecuted.

Respondent's narrow-gauge, restricted view of what constitutes an "ordained minister" and "preaching the gospel" prevents respondent from discerning the import of the findings of the court below. (Respondent's brief, page 18.)

The Alabama Supreme Court and the Alabama Court of Appeals found that petitioner was an ordained minister preaching publicly on the streets by distribution of pamphlets setting "forth the gospel of the Kingdom of God as he believes and preaches it". R. 3-4, 62..

The basis for the conviction, according to the State Supreme Court, was that "he cried 'Two copies for five cents.'" (R. 6)

In the trial court respondent admitted that petitioner was an ordained minister and engaged in preaching the gospel on the occasion in question. (R. 54)

In this Court the respondent's position on this question has been shifted.

Such change has taken place because it is respondent's private opinion that petitioner's challenged activity is "commercial" merely because it is unlike or does not conform to that commonly recognized and practiced by religious clergymen.

As long as the act of worship by an inhabitant of this land—be he a clergyman, or this petitioner, or any other person—does not infringe the law of morals or the right of property of others, the judiciary or any administrative agency is precluded from invading the field of opinion and right practice to say that a given activity is not in fact an act of worship, or “preaching the gospel”.

To “preach” means to proclaim a message.

“Preaching the gospel of the kingdom of God” means proclaiming to others the Scriptural truths of and concerning Jehovah God and His kingdom, The Theocracy, under Christ Jesus.

To be *ordained* thus to minister or serve merely means to be appointed, by the proper authority, to a position or office to perform duties specifically assigned. Jehovah’s witnesses being selected by Almighty God, JEHOVAH, it follows that Jehovah is the authority who ordains the servant or minister, as it is written at Isaiah 42:1; Isaiah 43:10-12; Isaiah 61:1-3; John 15:16. Those and other Scriptures clearly state the commission of authority given by Almighty God through His Son Christ Jesus to persons on earth who are servants, or ministers, of Jehovah.

Since Jehovah’s witnesses operate in a legal and orderly way through their corporate representative the Watchtower Society, they also possess an earthly ordination.

The courts below wrongly justified respondent’s invasion of petitioner’s right, by holding that “a preacher” must pay a license tax when he elects to preach by disseminating printed information on the streets and simultaneously receives money contributions to carry forward such work.

Respondent’s argument, in effect, interprets *privately* (i. e., for respondent’s *purpose* rather than for the purpose of the Teacher, Christ Jesus) the language of the Lord Jesus—“Render to Caesar things that are his, and to God things which are His” (Matthew 22:21)—to mean that a minister under contract with *the Creator* can be required to violate that contract and his conscience by conforming

to the will of a *creature* (i. e., the State) through asking for and obtaining a license before performing acts which *the Creator* in His written Word commands His ministers to do. Because this direct burden violates God's law it cannot be properly deemed one of the demands of "Caesar" to be complied with. *Private* misinterpretation of the Scriptures is 'wresting the Word of God' (2 Peter 3:16); for "no prophecy of the scripture is of any private interpretation". —2 Peter 1:20.

By recording the course of action of His faithful ministers (Hebrews, chapter 11, and other Scriptures), Almighty God has made manifest His interpretation, i. e., the true construction of the Master's words (Matthew 22:21) concerning the obligation of all persons of good-will toward Almighty God with respect to conflicting illegal and wrongful demands of "Caesar". The rule followed by every sincere servant of Jehovah and of Christ Jesus is that such servant willingly and joyfully conducts himself in an upright manner, obeying every law of the land which is not in conflict with JEHOVAH'S law, which is supreme, eternal. This position is exactly like that approved by Blackstone and Cooley. See Blackstone *Commentaries* (Chase, 3d ed.), pages 5-7; Cooley, *Constitutional Limitations*, 8th ed., page 968. As to human demands that conflict with the Creator's perfect commandments to His ministers, the God-given rule is that announced by Jesus Christ's apostle Peter: "We ought to obey God rather than men." "Whether it be right in the sight of God to hearken unto you more than unto God, judge ye." —Acts 5:29; Acts 4:19.

Requiring any minister of Almighty God to pay a tax before he preaches by disseminating God's message in printed form (and simultaneously receives money contributions to aid such work) conflicts directly with the law of Almighty God, as well as with the Federal Constitution, because it is a *direct burden*.

Respondent admitted that the clergy of all denominations in Opelika distributed literature when carrying on

religious work and simultaneously received money contributions for such work, and were not required to pay the license tax and none had been prosecuted for failure to pay. (R. 52)

Although "agents" selling or otherwise distributing Bibles are specifically excepted by the ordinance, it is noticed that neither clergymen nor ministers of the Word of God are named in the ordinance.

Can Invasion of the Right Be Justified?

The remaining question is whether or not such invasion is justified under the exceptions allowed by this Court in *Watson v. Jones*, 80 U.S. 679, 728. No such exceptions appear in this record. Therefore the State Supreme Court had no authority to invade petitioner's rights by applying this ordinance.

Respondent, the trial court and the Alabama Supreme Court wrongly contend that petitioner was engaged in a *commercial* activity. Not only is there no evidence to support such contention, but it is in total disregard of existing evidence that petitioner was preaching the gospel, and "did not sell" (R. 47-50), i. e., did not act for a *commercial* objective, did not aim to acquire pecuniary gain for himself as in conducting a trade or business enterprise.

Wholly *incidental* to petitioner's main activity of preaching the gospel is his taking of money contributions. Other courts have specifically found that the taking of money contributions is entirely *incidental*, collateral, to the main purpose of preaching the gospel of God's kingdom, THE THEOCRACY. See

Donley v. City of Colorado Springs
40 F. Supp. 15

Zimmermann et al. v. Village of London (Ohio)
38 F. Supp. 582

State [S. Car.] v. Meredith
15 S. E. 2d 678

Cantwell v. Connecticut

310 U. S. 296

Semansky v. Stark

199 So. 129

Thomas v. Atlanta

1 S. E. 2d 598

Cincinnati v. Mosier

22 N. E. 2d 418

State of Iowa v. Mead et al.

300 N. W. 523

In each of the cases just cited the activity involved was that of Jehovah's witnesses.

Cases relied on by respondent in justifying the decision below involved general taxes and licenses affecting the gross proceeds of newspaper business, which tax and licensing provisions were not directed at, or a direct burden on, distribution of literature, or calculated on the basis of circulation; but which were entirely incidental and collateral thereto.

Here the license tax throws the burden on the distributor and is a direct encumbrance upon circulation.

The holding in *Coble [Lois Bowden et al.] v. Fort Smith, Ark.* (151 S. W. 2d 1000; *certiorari denied*, 62 S. Ct. 99) is erroneous, unsound and unconstitutional. Such "denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."

United States v. Carver

260 U. S. 482, 490

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.

240 U. S. 251, 258

Ohio ex rel. Seney v. Swift & Co.

260 U. S. 146, 151

Atlantic Coast Line R. Co. v. Powe

283 U. S. 401, 403

The license tax here cannot be distinguished from the type of law requiring a permit from a police chief or other authorized official in whom is vested discretion to grant or refuse the permit. This character of law is admittedly unconstitutional. See *Lovell v. Griffin*, 303 U. S. 444, and *Schneider v. State*, 308 U. S. 147. The same prohibitive result or evil can be and is reached under the license tax law here through increasing the license fee so as to make it impossible for all, except the ultrarich, to exercise constitutional rights guaranteed to everyone. Thus the right of liberty and freedom secured to all by the Constitution would become the prerogative of the wealthy.

Indeed, one might be too poor to pay even the smallest possible license fee that may be fixed, and thus, by reason of his poverty, be refused the rights guaranteed him under the Constitution. The exercise of rights so vital to the maintenance of democratic principles is not and cannot be made dependent upon one's ability to raise sufficient funds wherewith to pay a license-tax fee as a condition precedent to the exercise thereof. To thus hold might and would deprive large segments of the population of the guarantee of their freedom. The results would be a substantial dissolution of the rights of the people and a serious impairment of equality of the inhabitants of this land, and would make indigence a basis for restricting freedom of civil rights.

The ordinance questioned here permits the people, in the exercise of their constitutional rights, to be divided into two classes: one class with worldly riches free to exercise the right of freedom of press and worship according to the dictates of conscience, and another class that is poverty-stricken to the point of being unable to purchase the required license to exercise their vital rights. Thus the ordinance is at war with the Constitution and is a short-sighted blow at the security of the people's liberties.

Laws which make unlawful the bringing of indigents into a state are unconstitutional and void. See *Edwards v. California*, 62 S. Ct. 164, 166-170. The principle announced

in that case makes such, by analogy, authority for the petitioner here.

Like "Free Commerce"

The license-tax here applied to the exercise of an admitted constitutional right can be likened to the various kinds of taxes that have been knocked down as being unconstitutional burdens upon interstate commerce.

Petitioner does not and can not rely upon the interstate commerce clause itself. However, by analogy, petitioner's exercise of his rights of "free press" and "worship" is entitled to *equal protection* against any direct-tax burden, even as the right of "free commerce between the states".

This Court has held to be bad taxes and license fees constituting a direct burden against interstate commerce. Such cases, by analogy, show that a similar tax, which directly burdens the exercise of freedom of press and worship, is likewise bad.

This Court has declared in numerous cases that license-tax laws and peddlers' license ordinances similar to the one here involved are unconstitutional when construed and applied to cover peddlers or agents selling from house to house or on the streets merchandise shipped from another state. See *Sabine Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 494-496; *Caldwell et al. v. North Carolina*, 187 U. S. 622, 624-632; *Rearick v. Pennsylvania*, 203 U. S. 507, 510-513; *Dozier v. Alabama*, 218 U. S. 124, 126-128, and *Real Silk Hosiery Mills v. City of Portland et al.*, 268 U. S. 325, 335-336.

In these trying hours this Court will be equally as hasty and astute to protect the rights under the "Bill of Rights" and the Fourteenth Amendment to the Constitution as it is in sustaining the commerce clause, especially when human rights are threatened, as here, with destruction by the direct burdening of circulation and distribution, the very life of "free press".

Respondent contends that because petitioner refused to apply for a license he is estopped from questioning the constitutionality of the ordinance as construed and applied to him.

The courts of Alabama did not urge this technicality and proceeded to discuss and decide the constitutionality of the ordinance as construed and applied. Therefore it is too late to urge the doctrine of *Smith v. Cahoon*, 283 U. S. 553, 562, which was not relied on in the court below. Since the court below decided the constitutionality of the ordinance as construed and applied, it is the duty of this Court to decide the same. This same argument of respondent was urged by the State in *Schneider v. State*, 308 U. S. 147, and was brushed aside by this Court.

Certainly this honorable Court would not hold that a person is required to first violate the law of Almighty God and his own conscience by applying for a permit to do what Almighty God commands him to do and this he must do before he could question the validity of the ordinance under which he is arrested.

The very act of applying for a permit to engage in the service or worship of Almighty God, as petitioner was doing in this case, would cause him to violate his conscience and to violate the specific command of the Creator to 'preach this gospel of the kingdom' from house to house and on the public ways; and certainly it is not within the power of the state or courts to compel one to violate his conscience or violate the supreme law as a condition precedent to raising the question of the validity of an ordinance on appeal or certiorari petition to this Court.

Conclusion

Although many courts have enthusiastically followed this Court's *Lovell v. Griffin* doctrine, there have been, as here, studied refusals to be bound.

Therefore, despite the clearly definitive nature of ex-

positions by this Court during the past decade of individual activities it deems within the scope of the constitutional protection for freedom of worship, speech, and press, apparently an even more unmistakable expression of its views on this peculiarly *American* issue is a public necessity—to aid lower courts to discern the ample measure of protection the Fourteenth Amendment affords.

To that end your petitioner humbly suggests that his rights, here awaiting final consideration and definition, this Court can well afford to weigh and scrutinize, in historical perspective, from the broad vantage point of calmer days than these of 1942: See Shattuck, "The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitutions which Protect 'Life, Liberty, and Property'" (Cambridge, 1890), 4 Harv. L. Rev. 365-392; and Warren, "The New 'Liberty' Under the Fourteenth Amendment" (Washington, 1926), 39 Harv. L. Rev. 431.

HAYDEN C. COVINGTON

Attorney for Petitioner

IN THE
Supreme Court of the United States

October Term, 1941.

DOCKET No. 280.

ROSCO JONES, *Petitioner*,

v.

CITY OF Opelika, *Respondent*.

On Petition for Certiorari to the Supreme Court of Alabama.

BRIEF FOR RESPONDENT IN OPPOSITION.

WILLIAM S. DUKE,
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BRIEF FOR RESPONDENT IN OPPOSITION.

OPINION.

The opinion of the Supreme Court of Alabama, not yet officially reported, appears in the Record at pp. 3 to 9, and the judgment of that Court appears in the Record at pp. 2 and 3. The opinion of the Alabama Court of Appeals, not yet officially reported, appears in the Record at pp. 62 to 65.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)). The judgment of the Supreme Court of Alabama was entered on May 22, 1941 (R. 2). The petition for writ of certiorari

has been improvidently filed, and this Court is without jurisdiction to consider the matters raised since the judgment of which petitioner complains is not final within the meaning of Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)).

QUESTION PRESENTED.

Whether or not a municipal ordinance prescribing license or privilege taxes for trades, vocations and professions conducted within the City of Opelika deprived petitioner, a street vendor of religious literature, of his Constitutional right of "freedom of press, speech or of conscience and the worship of Almighty God" in the face of his refusal to pay the prescribed tax and secure the license provided for by said ordinance.

MUNICIPAL ORDINANCE INVOLVED.

The "City License Schedule for 1939" is a municipal ordinance prescribing "the rates for license or privilege taxes for trades, vocations, professions and other businesses conducted within the City of Opelika, Alabama, and its police jurisdiction," and containing certain "conditions and provisions for the conduct thereof" and "penalties for the violation of said ordinance". Separately listed therein are numerous trades, vocations, professions and other businesses, together with the rate of tax applicable to each, and Section 12 thereof provides a procedure for the creation of other classifications not listed in the Schedule. Among the trades, vocations and professions listed is that of "Book Agent (Bibles excepted)—\$10.00." The ordinance *in toto* will be found on pp. 21 through 38 of the Record.

CONSTITUTIONAL PROVISIONS INVOLVED.

Petitioner asserts that Amendment I and Section 1 of Amendment XIV of the Federal Constitution are violated by the operation of the foregoing ordinance in its effect on him.

"Article I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

"Article XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

Petitioner is identified as an ordained minister of the Gospel of Jehovah's Kingdom and represents himself to be one of Jehovah's Witnesses consecrated to bear witness concerning the Kingdom of Jehovah God. He was arrested while going about the streets of the City of Opelika holding pamphlets in his hand and saying to the public: "Get your two copies for five cents." The pamphlets were entitled "Facism or Freedom" and "Face the Facts and Learn the Only Way of Escape," and generally set forth the gospel of the Kingdom of God as he and others of his persuasion believed and preached it. Regarding himself as sent by Jehovah God to do His work and contending that an application for license would have been an act of disobedience to Jehovah's Commandment, he neither sought nor secured a license or offered to pay the \$10 tax prescribed by the ordinance for an annual license for book agents, in which category petitioner was placed. He was arrested, convicted first in the Recorder's Court of the City of Opelika and subsequently on appeal in the Circuit Court on the charge of selling or offering for sale books without a license being first obtained from the Clerk in accordance

with the "City License Schedule of 1939" (R. 11, 16, "City License Schedule for 1939" Section 4, R. 22). On appeal, the Court of Appeals of Alabama held that the conditions and provisions of the City License Schedule, as applied to petitioner, were invalid and the conviction was set aside. On a petition for certiorari filed by the City of Opelika, the Supreme Court of Alabama reversed the Court of Appeals and remanded the cause to said court for further proceedings therein.

ARGUMENT.

A. Jurisdictional.

The Judgment of the Supreme Court of Alabama Sought to be Reviewed is Not a "Final Judgment or Decree," and Hence Not Subject to Review by the Supreme Court Under Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)).

Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)), invoked by petitioner is unavailable to him as the judgment sought to be reviewed is not a "final judgment or decree" within the meaning of that section. After petitioner's conviction in the Recorder's Court and Circuit Court, the Court of Appeals of Alabama set aside the conviction because of alleged Constitutional infirmities in the ordinance as applied to petitioner (R. 61-65). On May 22, 1941, the Supreme Court of Alabama granted a petition for certiorari to the Court of Appeals of Alabama and adjudged as follows:

"It is therefore considered that the judgment of the Court of Appeals be reversed and annulled, and the cause remanded to said court for further proceedings therein." (R. 2-3.)

This is not a final judgment in fact or as contemplated by Section 237 (b) of the Judicial Code, which provides for review of "any cause wherein a final judgment or decree has been rendered * * *". On this subject, this Honorable Court has said:

"We have frequently held that a judgment reversing that of the court below, and remanding the case for further proceedings, is not one to which a writ of error will lie. * * *

"We have, therefore, always made the face of the judgment the test of its finality, and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case. * * ." (*Hasseltine v. Central Bank of Springfield, Missouri*, 183 U. S. 130, 131; See also *Schlosser v. Hemphill*, 198 U. S. 173, 175; *Louisiana Navigation Company v. Oyster Commission of Louisiana*, 226 U. S. 99).

Applying this doctrine to the case at hand, it is apparent that review in this Court may not be had at this stage of the proceedings. It is self-evident that the court's decision does not finally dispose of the matter, as the intermediate court was specifically by it ordered to conduct further proceedings. In accordance with the rule just stated it is unnecessary to go beyond this point to establish the proposition that the judgment in question is not ripe for Supreme Court review. It is to be observed in passing, however, that under the reversal and remand to the intermediate court that court quite conceivably could consider other factors presented to it and take such proceedings which might result in a different decision either sustaining or reversing the conviction of the trial court.

B. The Merits.

- (1) **The Opelika "City License Schedule for 1939" Brought in Question is a Valid Exercise of the Municipality's Police and Taxing Powers and in No Way Abridges or Restricts Petitioner's Right of Free Speech, Press or Conscience.**

The ordinance here involved does not in any respect purport to prohibit petitioner or anyone else from distributing literature pertaining to religious or any other subjects or from engaging in the business of book agent or seller. Nor does it restrict in any sense his freedom to worship in what

ever manner he sees fit. It has no such purpose deliberately, nor can it be said that it creates such results inadvertently. It is a plain, ordinary municipal business privilege or license tax similar to those employed in numerous communities throughout the country, and is free of any of the pernicious characteristics attributed to it by petitioner. It was not meant as,—nor does it result in any form of prior licensing or censorship contrary to our Constitutional guaranties.

As will be seen on inspection, the ordinance lists alphabetically the various trades, professions and vocations plied in Opelika, and as a catch-all sets up a procedure for the establishment of new classifications not specifically set forth. A rate of tax or license fee is prescribed for each classification so listed. The ordinance creates no conditions precedent to the issuance of the license save the payment of the fee charged. In the present case, petitioner as a book agent was required to pay \$10 for which, if he had applied, he would unquestionably have received an annual license. There are no requirements that the City satisfy itself as to the qualifications of the licensee or the material to be sold and distributed. On the contrary, it is clear under the plain language of this ordinance that the City would be without authority to refuse issuance of a license to petitioner upon the tender of the specified fee, and if, under such conditions, the City did refuse, mandamus would lie to enforce its delivery. *Marbury v. Madison*, 1 Cranch 137.

Something entirely different was involved in the case of *Lovell v. Griffin*, 303 U. S. 444, cited as though conclusive on the problem by petitioner. In that case, the City of Griffin was engaged not in routine business privilege licensing but in affirmatively prohibiting the distribution of "circulars, handbooks, advertising or literature of any kind" as a nuisance unless specific permission from the city manager had been obtained. This indeed was something different from the ordinance involved in the instant case. Here was no perfunctory issuance of licenses to engage in any business upon payment of a fee, but rather a prohibition against dis-

tribution of press material without prior government approval. Such an ordinance properly was declared void on its face as striking "at the very foundation of the freedom of the press by subjecting it to license and censorship"¹ but it bears no relationship to the ordinance involved herein.

It cannot be said that merely because both ordinances employ the word "license" that they must of necessity relate to the same thing. The word "license" has been used to mean many different things, and its range of definition is extensive. As used in the ordinance in the *Lovell* case, it connoted prior censorship, examination of material and ultimate permission to distribute based thereon. As used by the City of Opelika in its "City License Schedule of 1939" it is employed for little purpose other than to designate the fee charged with respect to the various avenues of endeavor listed.² Certainly it implies nothing so sinister as a previous restraint on the business of publishing and distributing press material. Such was the holding of the Supreme Court of Arizona in *Giragi v. Moore*, 48 Ariz. 33, 110 A. L. R. 314, 323; when it said:

"First it is said that the requirement that persons obtain a license before engaging or continuing in a busi-

¹ *Lovell v. Griffin*, *supra*, p. 451.

² Indeed, with marked frequency the word "license" is employed throughout the ordinance as though it were synonymous with the words "fee" or "tax". E. g.,

" * * * half of such license shall be charged and collected, * * * " (Sec. 2.)

" * * * the City of Opelika shall have a lien for such license * * * as of the date the license is due, * * * " (Sec. 5).

" * * * shall pay the same license for such vocation, exhibitions or profession * * * " (Sec. 6.)

" * * * who shall thereon fix a reasonable license for such business or vocation * * * " (Sec. 12.)

" * * * shall pay such license on or before the day such business or vocation is actually begun * * * " (Sec. 13.)

"All licenses will become delinquent * * * and an amount equal to 10 per cent of the amount of such license will be added. * * * " (Sec. 14) (Italics Supplied)

ness subject to the tax is a previous restraint on such business, in this case on the business of publishing a newspaper. *No condition except payment of a license fee is attached to the issuance of the license. All persons who pay the fee are entitled to receive a license and for whatever location it may be applied for. * * ** (Italics supplied)

And this Court dismissed an appeal from that decision "for want of a substantial federal question". (301 U. S. 670.)

The City of Opelika has enacted no legislation forbidding or in any way restricting dissemination of information by pamphlet, book, or otherwise. It has, on the other hand, created a license schedule calling for payment of certain fees by those wishing to engage in commercial callings including that of "book agent". This Court has held similar municipal legislation valid:

"We are not to be taken as holding that commercial soliciting or canvassing may not be subjected to such regulations as the ordinance requires. Nor do we hold that the town may not fix reasonable hours when canvassing may be done by persons having such object as the petitioner. Doubtless there are other features of such activities which may be regulated in public interest without prior license or other invasion of constitutional liberty. * * *" *Schneider v. State*, 308 U. S. 147, 155.

A question cognate to this was presented in *Cox et al v. State of New Hampshire*, 312 U. S. . . . (decided March 31, 1941). There, a New Hampshire statute provided that parties desiring to parade through public streets must first secure a license and pay a prescribed fee therefor. Certain Jehovah Witnesses, ignoring the provisions of this statute, paraded through the streets of Manchester displaying signs bearing such legends as, "Religion is a Snare and a Racket" and "Fascism or Freedom—Hear Judge Rutherford and Face the Facts," without securing a license or paying the fee in accordance with the statutory requirement.

Holding that a government could, without impinging on constitutional rights, adopt such reasonable regulations pertaining to the use of its public ways, this Court said:

"If a Municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state Court contravened any constitutional right."

And an ordinance of the City of Manchester (also challenged, by members of the Company of Jehovah's Witnesses) requiring peddlers or canvassers to obtain a badge of identification prior to selling on the streets was found valid and not subject to the charge of unlawful restriction on the freedom of press or the free exercise of religion. In its opinion, the Circuit Court of Appeals said:

"By contrast the Manchester ordinance now before us contains no element of prior censorship upon the distribution of literature. It requires only a simple routine act of obtaining a badge of identification before a person can sell on the streets. This reasonable police regulation, in our opinion, imposes no substantial burden upon the freedom of the press, or the free exercise of religion.

No doubt, as in the case of any regulatory law, there is the possibility (though the record indicates no likelihood of it) that officials might act arbitrarily and in excess of their rightful powers in administering the ordinance. The superintendent of schools might arbitrarily withhold licenses from Jehovah's Witnesses, despite his mandatory duty to issue the badges upon receipt of applications 'properly executed'. A license once given might be revoked upon some trumped-up pretext. By Section 3, the badge-holder is required to conform to the ordinances of the City and the regulations of the board of mayor and aldermen; some outrageous regulation might be issued, and for non-compliance with

it a license might be revoked under Section 4. What the legal situation would be if any of these or other possibilities came to pass need not be examined now. It suffices to say that recognition of such possibilities does not render the ordinance void on its face, nor justify an injunction at the behest of persons who have failed to take the simple step of applying for a badge—a badge which, so far as the record indicates, would have been issued out of hand, as a matter of routine ministerial duty.” *City of Manchester et al. v. Leiby*, 117 F. (2) 661.

On April 7, 1941 this Court denied certiorari. 313 U. S.

.....
There are no constitutional inhibitions against the levying of license or privilege taxes or the enforcement of reasonable regulations on those engaged in press activities. *Grosjean v. American Press Co.*, 297 U. S. 233, 250; *Associated Press v. National Labor Relations Board*, 301 U. S. 103, 133; *Giragi v. Moore*, 48 Ariz. 33, 301 U. S. 670; *Arizona Publishing Co. v. O'Neil*, 22 F. S. 117, Certiorari denied, 304 U. S. 543.

In the recent case of *Donnelly Corporation v. City of Bellevue*, 283 Ky. 152, 140 S. W. (2d) 1024 (decided May 21, 1940) involving an ordinance requiring a \$25.00 privilege license for the distribution of pamphlets and circulars, the Court of Appeals of Kentucky held inapplicable the doctrine of the *Lovell* case, *supra*, and upheld the right of the community to impose the license requirement. So striking is the parallel between the facts of that and the instant case, the language of the Court should be of interest:

“There is, however, a clear distinction between the ordinances held by the Supreme Court to be abridgments of the right of free speech and press and the ordinance before us. It does not undertake either to prohibit or restrict the distribution of literature of any sort. It only imposes a tax upon the privilege of carrying on the business of advertising in a particular manner. Absent from the ordinance is any censorship of substance or form. No power of discrimination as

between any persons or class of citizens is reserved or exercised. The privilege of distributing advertising matter is available to any one paying the tax. True it is that a license is required. We construe the term, however, not in the sense of being a grant or permission, but as descriptive of the tax and the document evidencing its payment. The penalty prescribed is not for distributing advertising matter but for exercising the privilege without paying the tax. * * *

(2) The License Requirement Being Valid on Its Face Required Observance, and Petitioner Cannot Be Heard to Complain of a Revocation Clause in No Way Prejudicing Him.

The requirement that petitioner pay for and secure a license to engage in the calling of book agent was valid on its face and petitioner's conduct in offering books for sale without securing such license subjected him to the penalties set forth in the ordinance. He is in no position to "complain because of his anticipation of improper action in administration." *Smith v. Cahoon*, 283 U. S. 553. See also *Lehon v. Atlanta*, 242 U. S. 53.

It is charged that Section 1 of the ordinance, which provides for revocation of licenses in the discretion of the City Commission "with or without notice to the licensee",¹ is invalid and for that reason petitioner was entitled to ignore the ordinance *in toto*. No license having been sought or obtained by petitioner the question of the validity of that section of the ordinance having to do with revocation thereof is not germane. *Ex Parte Byrd*, 84 Ala. 17, 4 So. 397; *Little v. City of Attalla*, 4 Ala. Appeals 287, 58 So. 949. Its invalidity could only be of significance if the section were inseparable, thus rendering the entire ordinance void. *Smith v. Cahoon*, *supra*.

Section one, however, is separable from the ordinance, and if invalid does not vitiate the whole. The ordinance contains a section which provides:

¹ Record p. 22.

"Should any section, condition, or provision or any rate or amount scheduled as against any particular occupation exhibited in the foregoing schedule be held void or invalid, such invalidity shall not affect any other section, rate or provision of this license schedule." (R. 38.)

It is now well settled that a provision such as this creates the presumption that, eliminating invalid parts, the legislature would have been satisfied with the remainder, and reverses any presumption that the legislature intended the act to be effective as an entirety or not at all. *Champlin Refining Co. v. Corporation Commission*, 236 U. S. 210, *Electric Bond and Share Co. v. Securities & Exchange Commission*, 303 U. S. 419.

Furthermore, irrespective of the separability clause, it is otherwise clear that the legislative intent, namely to create a schedule of taxes and fees assessable against those engaging in business in Opelika, is fully carried out to all intents and purposes even though section one were struck down. To preclude revocations without notice does not alter the principle aim of the ordinance. Nor does it make obscure that about which the legislature intended to legislate.

Brazee v. Michigan, 241 U. S. 340.

Railroad Retirement Board v. Alton, 295 U. S. 330

Carter v. Carter Coal Co., 298 U. S. 238

Ratta v. Healy, 1 F. S. 669.

See also:

Sloss-Sheffield Steel & Iron Co. v. Smith, 175 Ala. 260, 57 So. 29

Ex Parte Bizzell, 112 Ala. 210, 21 So. 371

Mayor and Aldermen of Birmingham v. Alabama

Great Southern Railroad Co., 98 Ala. 134

Lowndes County v. Hunter, 49 Ala. 507.

In *Electric Bond & Share Co. v. Securities & Exchange Commission*, 303 U. S. 419, (decided March, 1938) the peti-

tioner was not permitted to attack the constitutionality of the registration provision of the Public Utility Holding Company Act by contending they were inseparably connected with allegedly invalid regulatory provisions not yet employed by the Commission. This Court upheld the registration provision without regard to the regulatory provisions because it found that Congress had a definite purpose in the registration itself unaffected or changed by the regulatory sections.

The present case presents a parallel situation. The principle purpose of the ordinance is the licensing itself and the collection of the prescribed fees. This aim is unaffected by the regulatory section dealing with revocations and consequently is left intact even though Section One were found to be invalid.

CONCLUSION.

No adequate reason for certiorari is presented. The petition should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

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RESPONDENT'S BRIEF.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

DOCKET NO. 280.

ROSCO JONES, *Petitioner*,
v.
CITY OF OPELIKA, *Respondent*.

On Writ of Certiorari to the Supreme Court of Alabama.

RESPONDENT'S BRIEF.

OPINION.

The opinion of the Supreme Court of Alabama, reported in 3 So. (2d) 76, appears in the record at pages 3 to 9; the judgment of that Court appears in the record at pages 2 and 3. The opinion of the Alabama Court of Appeals in this cause is reported at 3 So. (2d) 74, and appears in the record at pages 62 to 65.

2

JURISDICTION.

Petitioner invokes the jurisdiction of this Court under Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)). The judgment of the Supreme Court of Alabama was entered on May 22, 1941 (R. 2). Review by this Court has been improvidently requested for this Court is without jurisdiction to consider the matters raised since the judgment of which petitioner complains is not final within the meaning of Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)) and the decisions of this Court thereunder.

QUESTION PRESENTED.

Whether or not the requirements of a municipal ordinance prescribing a schedule of license or privilege taxes for all trades, vocations, professions, and other businesses conducted within the City of Opelika deprived petitioner, a vendor of religious literature, of his Constitutional right of "freedom of press, speech or of conscience and the worship of Almighty God" in the face of his refusal to pay the prescribed tax and secure the license provided for by said ordinance.

MUNICIPAL ORDINANCE INVOLVED.

The "City License Schedule for 1939" is a municipal ordinance prescribing "the rates for license or privilege taxes for trades, vocations, professions, and other businesses conducted within the City of Opelika, Alabama, and its police jurisdiction", and containing "certain conditions and provisions for the conduct thereof" and "penalties for the violation of said ordinance." Separately listed therein are numerous trades, vocations, professions and other businesses, together with the rate of tax applicable to each, and prescribed machinery for the creation of other classifications not specifically listed in the ordinance. Among the trades, vocations, professions and businesses listed is that of "Book Agent (Bibles excepted) — \$10.00." The condi-

tions and provisions of the ordinance provide for such things as licenses for a period less than one year, transfers of licenses, delinquencies, liens for the payment of the tax, and related matters. Section 1 of the ordinance (held to be invalid by the Alabama Court of Appeals, in a decision subsequently declared erroneous by the Supreme Court of Alabama) provides as follows:

"1. Right of City to Revoke.

All licenses, permits or other grants to carry on any business, trade, vocation, or professions for which a charge is made by the City shall be subject to revocation in the discretion of the City Commission, with or without notice to the licensee."

At the conclusion of the ordinance, the following separability clause is found (R. 38):

"Should any section, condition, or provision [sic] or any rate or amount scheduled as against any particular occupation exhibited in the foregoing schedule be held void or invalid, such invalidity shall not affect any other section, rate or provision of this license schedule."

The ordinance, *in toto*, will be found at pages 21 through 38 of the Record.

CONSTITUTIONAL PROVISIONS INVOLVED.

Petitioner asserts that Amendment I and Section 1 of Amendment XIV of the Federal Constitution are violated by the operation of the foregoing ordinance in its effect on him.

"Amendment I. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

"Amendment XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

Petitioner is a member of the group known as Jehovah's Witnesses,¹ and stated that he was a minister of the gospel. When arrested, he was going about the streets of the City of Opelika holding pamphlets in his hands and saying to the public: "Get your two copies for five cents."

Contrary to repeated assertions which are found at various parts of the petitioner's brief, there is no testimony in the record that the books were given away, or that "contributions" were sought. Petitioner was convicted on the testimony of the arresting officer to the effect that he was offering the books for sale. Petitioner has dealt at great length with the contents of these pamphlets, but it seems appropriate to the issues in this cause for respondent to state nothing more than that they were entitled "Fascism or Freedom" and "Face the Facts and Learn the Only Way of Escape;" generally set forth the gospel of the Kingdom of God as petitioner and others of his persuasion believed and preached it; and could not (and it is not so contended) be considered as a Bible and thus within the exception stated in the ordinance.

Regarding himself as sent by Jehovah God to do His work, and protesting that an application for license would have been an act of disobedience to Jehovah's Commandment, petitioner neither sought nor secured a license or

¹ For a discussion of previous cases in this Court, involving this group, see Chafee "Free Speech in the United States", p. 398 *et seq.*

offered to pay the \$10 tax prescribed by the ordinance for an annual license for book agents, in which category he was placed. It is conceded that he "refused to apply for a license" (Petitioner's brief, p. 22). He was arrested and convicted first in the Recorder's Court of the City of Opelika and subsequently on review in the Circuit Court on the charge of selling or offering for sale books without a license being first obtained from the City Clerk in accordance with the "City License Schedule of 1939" (R. 11, 16, 63, "City License Schedule for 1939," Section 4, R. 22). On appeal, the Court of Appeals of Alabama held that the conditions and provisions of the "City License Schedule," as applied to petitioner, were invalid and the conviction was set aside. In its decision reversing the lower court's conviction, the Court relied almost entirely on Section 1 of the aforesaid ordinance providing for revocation of licenses already granted. On petition for certiorari filed by the City of Opelika, the Supreme Court of Alabama reversed the Court of Appeals and remanded the cause to said Court for further proceedings therein.

SUMMARY OF ARGUMENT.

(a) Jurisdictional.

It is submitted that this Honorable Court is without jurisdiction on this appeal under Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)) because of the fact that the judgment of the Supreme Court of Alabama to which this appeal is directed is not final within the meaning of the aforesaid Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)).

(b) The Merits.

The ordinance of the City of Opelika creates an ordinary, usual business privilege tax typical of many used throughout the country. Nothing on its face or established by extrinsic evidence warrants the conclusion that it prohibits in any unlawful manner the publica-

tion, circulation or distribution of press material or restrains the free exercise of religious beliefs. The doctrine of this Court announced in *Lovell v. Griffin*, 303 U. S. 444, making unlawful any municipal ordinance creating a previous restraint or a licensing or censorship on press material, is not applicable in the present case because the ordinance here is not directed at press activities, does not prohibit, censor or license the same, but instead is a simple tax statute covering all commercial callings within the jurisdictional environs of Opelika. The doctrine of this Court as announced in *Grosjean v. American Press Company*, 297 U. S. 233, in so far as it found illegal a "deliberate and calculated device in the guise of a tax to limit the circulation of information," not only is not authority for holding the present tax invalid, but by its very delineation between lawful and unlawful taxes of this character proves the one here involved to be good. The argument that the Opelika ordinance is invalid because Section 1 thereof permits revocation of licenses already granted "with or without notice to the licensee," is without merit for even though it were conceded that such a provision was improper the section is of no concern here since petitioner neither sought nor secured a license by paying the prescribed tax, and therefore cannot complain of a procedural section in no way affecting him. It cannot be said that because of its alleged invalidity the ordinance as a whole is invalid and therefore to be ignored, because Section 1 is separable from the ordinance under common law principles and further is made specifically separable by a separability clause contained in the body of the ordinance.

ARGUMENT.

A. Jurisdictional.

The Judgment of the Supreme Court of Alabama Sought to be Reviewed is Not a "Final Judgment or Decree," and Hence Not Subject to Review by the Supreme Court Under Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)).

A serious question of jurisdiction presents itself immediately. The judgment of the Supreme Court of Alabama to which the petition for writ of certiorari is directed is not a final judgment on its face or in fact, and consequently is not subject to judicial review at this stage and in the manner sought. Section 237 (b) of the Judicial Code (28 U. S. C. A. 344 (b)) invoked by petitioner is unavailable to him since that Act limits the jurisdiction of this Honorable Court to the review and determination of a "final judgment or decree". Such a "final judgment or decree" is not present in the case at bar.

After petitioner's conviction in the Recorder's Court and Circuit Court, he appealed to the Court of Appeals of Alabama, setting forth various assignments of error totaling in all some thirteen specifications of error in which, among other things, he charged that (1) he had been denied a jury trial;² (2) a motion for new trial had been erroneously denied;³ (3) a variance between proceedings in the Recorder's Court and Circuit Court had been allowed;⁴ (4) error was committed in excluding certain testimony;⁵ and (5) a motion to dismiss had been improperly denied.⁶

On appeal, however, the Court of Appeals of Alabama considered only those assignments of error which charged

² Assignment of Errors—Fifth, R. p. 61.

³ Assignment of Errors—Sixth, R. p. 61.

⁴ Assignment of Errors—Fourth, R. p. 60.

⁵ Assignment of Errors—Second and Third, R. pp. 59, 60.

⁶ Assignment of Errors—First, R. pp. 56, 57.

the unconstitutionality of the Opelika ordinance, the "City License Schedule for 1939," as inconsistent with the First and Fourteenth Amendments to the Federal Constitution.⁷ That Court said:

"His (petitioner's) defense was the unconstitutionality and invalidity of the ordinance (as applied to him), which requires a license to distribute printed matter. He says that it is in conflict with the Constitution of the State, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution in the following particulars, viz.:

(a) It abridges and denies freedom of speech and freedom of the press. And (b) It abridges freedom of worship and freedom of conscience and religious liberty."⁸

Nowhere in the opinion of that Court will there be found any reference to or decision on any of the other assignments of error relied upon by petitioner. Treating only of the ordinance and its alleged unconstitutionality, the Court found:

"But, as applied to appellant, the ordinance, for reasons we hope we have made clear hereinabove, is invalid—void, and of no effect. * * *

"The judgment of conviction rendered by the Circuit Court is reversed.

"And a judgment here, and hereby, rendered discharging appellant from further custody in these proceedings.

"Reversed and Rendered."⁹

On May 1, 1944, the Supreme Court of Alabama granted a petition for certiorari to the Court of Appeals of Alabama, deciding unequivocally that the intermediate appellate court's decision on this question was in error. It said:

⁷ Assignment of Errors—1-5 of A; B, C, R. pp. 57-59.

⁸ R. p. 63.

⁹ R. pp. 64, 65.

"It results from the foregoing that the opinion of the Court of Appeals is founded in error and the petition for writ of certiorari is hereby granted."¹⁰

The Supreme Court of Alabama neither considered nor decided any assignment of error other than those covered by the Court of Appeals in its decision. On the same day it issued its judgment granting the petition for the writ of certiorari to the Court of Appeals, reversing and annulling the judgment of the Court of Appeals and remanding the cause to that Court "for further proceedings therein." It provided:

"* * * It is therefore considered that the judgment of the Court of Appeals be reversed and annulled, and the cause remanded to said Court for further proceedings therein. * * *"¹¹

This is the judgment to which the present petition for writ of certiorari is directed. It is not, we submit, a final judgment reviewable under Section 237 (b) of the Judiciary Act (28 U. S. C. A. 344 (b)) invoked by petitioner. It is not so on its face, nor is it in fact. Interpreting the requirement of finality contained in Section 237 of the Judiciary Act, this Honorable Court has said:

"We have frequently held that a judgment reversing that of the court below, and remanding the case for further proceedings, is not one to which a writ of error will lie. * * *

"* * * We have, therefore, always made the face of the judgment the test of its finality, and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case. * * *"¹² *Haseltine v. Central Bank of Springfield, Missouri*, 183 U. S. 130, 131; see also *Schlosser v. Hemp-*

¹⁰ R. p. 9.

¹¹ R. p. 3.

hill, 198 U. S. 173, 175; *Louisiana Navigation Company v. Oyster Commission of Louisiana*, 226 U. S. 99.¹²

That the doctrine of finality applies as well to review by certiorari is well settled. In *Bruce v. Tobin*, 245 U. S. 18,¹³ involving proceedings on a petition for a writ of certiorari to the Supreme Court of the State of South Dakota, the Court discussed the new writ of certiorari provided for by Section 237 of the Judiciary Act. Mr. Chief Justice White, speaking for the Court, said:

"The act in question, although it deprived of the right of review by writ of error which had hitherto obtained in certain cases and substituted as to such cases the right of petitioning for review by certiorari, subjected this last right to the same limitation as to the finality of the judgment of the state court sought to be reviewed which had prevailed from the beginning under Sec. 709, Rev. Stats., Sec. 237, Judicial Code. Finality, therefore, continues to be an essential for the purposes of the remedy by certiorari conferred by the Act of 1916."

And the Court reaffirmed the "face of the judgment" doctrine, particularly as relating to certiorari proceedings, when it said:

"* * * But that contention is not open as it was settled under Sec. 709, Rev. Stats., Sec. 237, Judicial Code, that the finality contemplated was to be determined by the face of the record and the formal character of the judgment rendered,—a principle which excluded all conception of finality for the purpose of review in a

¹² And *per curiam* decisions to like effect:

Edgar Bros. Co. v. State Revenue Commission, 303 U. S. 626.

J. Bacon & Sons v. Martin, 302 U. S. 642.

American Bakeries Co. v. Huntsville, 299 U. S. 514.

Moran v. Loudoun National Bank, 297 U. S. 698.

Mississippi Central R. R. Co. v. Smith, 295 U. S. 718.

Williams v. H. C. Speer & Sons Co., 287 U. S. 562.

¹³ Followed by this Court in *Augusta Power Co. v. Savannah River Electric Co.*, 284 U. S. 574; *Brannan v. Harrison*, 284 U. S. 579.

judgment like that below rendered. *Haseltine v. Bank*, 183 U. S. 130; *Schlosser v. Hemphill*, 198 U. S. 173; *Louisiana Navigation Co. v. Oyster Commission of Louisiana*, 226 U. S. 99; *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 418, 419. The reenactment of the requirement of finality in the Act of 1916 was in the nature of things an adoption of the construction on the subject which had prevailed for so long a time.

"There being then no final judgment within the contemplation of the Act of 1916, the petition for a writ of certiorari is Denied."

In an effort to refute our position with respect to this jurisdictional question, respondent urged certain propositions of fact and law.¹⁴ The facts relied upon are grossly inaccurate and the law obviously inapplicable.

There is no basis for saying, as did petitioner, that:

"* * * the judgment of conviction rendered and entered against the petitioner by the Circuit Court of Lee County, Alabama, was affirmed by the Supreme Court of the State of Alabama by reversing the judgment of the Court of Appeals of Alabama. The judgment of the Court of Appeals of Alabama disposed of the whole case on the merits. *The judgment of the Supreme Court of Alabama likewise disposed of the whole case on the merits and directed the Court of Appeals to enter a judgment affirming the Circuit Court's judgment instead of reversing the judgment of conviction and setting it aside, as was done by the Court of Appeals.*"¹⁵ (Italics supplied).

And, just as there is nothing in the record of the proceedings of this case giving warrant or any justification for that statement, the clear, unambiguous language of the judgment of the Supreme Court of Alabama is sufficient to refute completely petitioner's conclusion that:

"Therefore the judgment of the Supreme Court of Alabama directed the Court of Appeals what judgment

¹⁴See Petitioner's Reply Brief (To Brief for Respondent In Opposition To Certiorari), pp. 1-3.

¹⁵Petitioner's Reply Brief, *supra*, pp. 1-2.

should be entered and left nothing to the judicial discretion of that Court or the trial court. The courts below have nothing to do but to execute the judgment already rendered."¹⁶

The four cases cited by petitioner in no manner support the general allegations made, and are of no application here. (1) *Rio Grande Railway Co. v. Stringham*, 239 U. S. 44, is authority for the proposition that a decision by a state supreme court reversing a lower court finding for the defendant in a suit to quiet title and remanding "the case with a direction to 'enter a judgment awarding to the plaintiff title to a right of way over the lands in question * * *'" was a final judgment. (2) *Board of Commissioners v. Lucas*, 93 U. S. 108, merely holds that a judgment of an appellate court reversing a decision of a lower court which had granted a temporary injunction, and remanding the cause to the lower court with instructions "to dismiss the complaint" was a final judgment. (3) *Bostwick v. Brinkerhoff*, 106 U. S. 3, commenced with a suit brought in the Supreme Court of New York by stockholders against bank directors charging negligence. A demurrer, raising among other things the right of the state court to consider the matter, was sustained. The Court of Appeals "reversed and judgment rendered for plaintiff on demurrer with costs, with leave to the defendants to withdraw the demurrer within thirty days, on payment of costs * * * and to answer the complaint.'" From this judgment a writ of error was taken to the Supreme Court. On these facts the Court found that it was without jurisdiction because the judgment of the Court of Appeals was not final. Mr. Chief Justice Waite, delivering the opinion for the Court, said:

"The rule is well settled and of long standing, that a judgment or decree, to be final, within the meaning of that term as used in the Acts of Congress giving this court jurisdiction on appeals and writs of error,

¹⁶ Petitioner's Reply Brief, *supra*, p. 2.

must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered. * * * The highest court of the State has decided that the suit may be maintained in the courts of the State. To that extent, the litigation between the parties has been terminated, so far as the State Courts are concerned, but it still remains to decide whether the directors have in fact been guilty of the negligence complained of and, if so, what damages the stockholders have sustained in consequence of their neglect. The Court of Appeals has given the defendants leave to answer the complaint, and the trial court has been directed to proceed with the suit accordingly. Such being the case, it can in no sense be said that the judgment we are now called on to review terminates the litigation in the suit."

(4) And finally, *Mower v. Fletcher*, 114 U. S. 127, merely supports the proposition for which we contend:

"That judgment is final for the purposes of a writ of error to this court, which terminates the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the Court below would have nothing to do but to execute the judgment it had already rendered."

There the judgment found to be final was one reversing the judgment of the Superior Court of Los Angeles County with directions to that Court "to enter judgment upon the findings for the plaintiff as prayed for in his complaint."

Applying the settled law to the case at hand, it is apparent that review in this Court may not be had at this stage of the proceedings. It is self-evident that the Court's decision does not finally dispose of the matter, as the intermediate court was specifically by it ordered to conduct further proceedings. In accordance with the "face of the judgment rule" it is unnecessary to go beyond this point to establish the proposition that the judgment in question is not ripe for Supreme Court review. But the facts here stand a

more searching test. It is clear that under the reversal and remand to the intermediate court that court could and undoubtedly should consider the other assignments of error presented to it but ignored in its decision, and take such further proceedings in accordance with the unequivocal mandate from its superior court.¹⁷

It is a well recognized rule that when an intermediate court has failed to pass on all matters properly before it the superior appellate court on reversal should remand the cause to the intermediate court for a determination of the issues not passed upon.^{17a} And the highest Court of Alabama has ruled that when it reversed a judgment of its intermediate court, the Court of Appeals, which had dealt with but one of the assignments raised by appellant, on the remand the intermediate court was required to pass upon such assignments as remained undecided. In *Box v. Metropolitan Life Insurance Company*, 168 So. 217, the Alabama Supreme Court said:

“(1) We observe that appellant assigned numerous errors on account of the rulings of the court on evidence made during the trial. We cannot consider them because the Court of Appeals has not done so since it was unnecessary because of their view of the sufficiency of the plea. But it is necessary on account of our view of that question. This cause must therefore be remanded to that court for further consideration.

“Certiorari granted; judgment of the Court of Appeals reversed, and cause remanded to that court.”

There can be no dispute but that in the case at bar, the Court of Appeals of Alabama, in its opinion failed to consider numerous assignments of error advanced by petitioner as a substantial part of his grounds for the request that the Circuit Court's judgment be reversed. This undoubtedly was because in its view on the constitutionality

¹⁷ See *Maryland Casualty Co. v. Jones*, 279 U. S. 792, 795, 796.

^{17a} 25 Corpus Juris Secundum, p. 1471, Par. 1945.

of the ordinance it was unnecessary to consider the other assignments. It has now been told, however, by the Supreme Court of the State that its view on this subject was in error and that Court has reversed the judgment of the Court of Appeals and remanded the cause to that court "for further proceedings therein." On such further proceedings, the Court of Appeals must take cognizance of the Supreme Court's view with respect to the constitutionality of the ordinance but is unfettered in other respects from considering for the first time the other assignments dealing with the exclusion of witnesses, the right of jury trial, variance in the charges and other matters raised (see p. 7 herein). Not only is the Court of Appeals not hampered in so doing, but we submit it is required to consider these matters under the mandate of the Supreme Court, consistent with established principles.¹⁷

This being so, the rule "that this court may not be called upon to review by piecemeal the action of a state court"¹⁸ applies, and the judgment should be found to lack that finality which is a *sine qua non* of review under Section 237 (b) of the Judiciary Act (28 U. S. C. A. 344 (b)).

B. The Merits.

- (1) **The Opelika "City License Schedule for 1939" Brought in Question is a Valid Exercise of the Sovereign Power of the Municipality of Opelika and in no Unconstitutional Way Abridges or Restricts Petitioner's Right of Free Speech, Press, Conscience or Religion.**

The First Amendment of the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; * * *." "The freedom of speech and of the press secured by the First Amendment against abridgment

¹⁷ *Box v. Metropolitan Life Insurance Company, supra.*

¹⁸ *Louisiana Navigation Co. v. Oyster Commission, supra, p. 101.*

by the United States is similarly secured to all persons by the Fourteenth against abridgment by a state." (*Schneider v. State*, 308 U. S. 147, 160).¹⁹

With this fundamental and well settled interpretation respondent is of course in thorough accord. It concedes that in its operation of a municipal government it must observe the principles involved, but they are not the only principles involved.

This Court has said:

"that in a free representative government nothing is more fundamental than the right of the people through their appointed servants to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that in our peculiar dual form of government nothing is more fundamental than the full power of the State to order its own affairs and govern its own people, except so far as the Federal Constitution expressly or by fair implication has withdrawn that power." The power of the people of the States to make and alter their laws at pleasure is the greatest security for liberty and justice * * *. *Twinning v. New Jersey*, 211 U. S. 78, 106.

Petitioner contends that because he is a minister of God he is free from the obligation created by the ordinance that persons engaged in the selling of books in the City of Opelika shall pay a business privilege tax. The position of the petitioner is clearly set forth in his brief as follows:

"The law of Almighty God is supreme, and when a law of the state requires His minister or ambassador to secure a license as a condition precedent to the doing of what Jehovah commands him to do, the minister must obey God and refuse to apply for the license. If he compromises and secures the license he must suffer everlasting death at the hand of Almighty God."

¹⁹ See also *Lovell v. City of Griffin*, 303 U. S. 444; *Gitlow v. New York*, 268 U. S. 652; *Stromberg v. California*, 283 U. S. 359; *Whitney v. California*, 274 U. S. 357.

“In such a conflicting situation the Constitution requires that the law yield to conscience of the individual molded by Jehovah God.” (Petitioner’s brief, p. 15)

The contention of the petitioner is well answered by the language of Mr. Justice Cardozo in *Hamilton v. Regents*, 293 U. S. 245, 268:

“Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.”

In the very recent decision of the Circuit Court of Appeals, First Circuit, in *City of Manchester et al v. Leiby*, 117 Fed. (2d) 661, 666 (certiorari denied, 313 U. S. 562), and with reference to similar contentions made by ordained ministers of the same sect, the Court said:

“The civil authority can never concede the extreme claim that police regulations of general application not directed against any sect or creed—however widely the regulations may be accepted as being reasonable and proper—are constitutionally inapplicable to persons who sincerely believe the observance of them to be ‘an insult to Almighty God.’ ”

The Trial Justice aptly summed up the matters involved in this case when, in addressing counsel for the petitioner, he said: “I don’t think there is any question of religious liberty involved in this. You evidently do. I think it is purely a question of whether this defendant was violating a simple ordinance here that has been in effect for a long

time. I do not think that this present defendant here has any more right to sell books on the streets than a person who is not a minister." (R. 46)

That ordinance which the Trial Justice properly described as the "simple ordinance" does no more nor less than set up a schedule of business privilege taxes for approximately two hundred and twenty-five different types of trades, professions or businesses plied in the City of Opelika. Separately listed along side each of the two hundred twenty-five odd categories, is the amount of tax charged in each case. The all-inclusive nature of the ordinance is demonstrated by the fact that Section 12 thereof sets up a procedure for the creation of classifications overlooked or which might come into existence subsequent to the enactment of the ordinance. (R. 24) Beyond any question (and there is no proof even suggesting anything contrary), the ordinance has as its only function the legitimate, legislative purpose of levying a business privilege tax on all those who desire to engage in any type of commercial calling within the municipality's jurisdiction. For example, bootblacks are required to pay a tax of \$5; auctioneers, \$25; cabinetmakers, \$10; florists, \$25; lawyers, doctors, dentists, osteopaths, and other professional men, \$15; piano tuners, \$10; and finally, book agents, \$10, under which petitioner was convicted. (R. 63)

It should be remembered that petitioner was not convicted for any alleged crime of going about the streets of Opelika selling literature. Nor can it be said that "It must be conceded that petitioner is an ordained minister, preaching the gospel, and that it was solely because he thus preached that he was arrested and prosecuted." Rather, his offense was simply that of selling books or pamphlets within the police jurisdiction of the City of Opelika *without having first paid the tax which all others similarly engaged were required by law to pay.* It is particularly desirable to keep this fact in mind in view of the charge by petitioner that "a gigantic wave of prosecutions and persecutions

against Jehovah's Witnesses * * * " is sweeping over this " 'land of the free and home of the brave' " ²⁰ .

No amount of intemperate language can alter the fact that the only thing at issue in this case is the right of any community to assess and collect, under normal and traditional forms, taxes for the production of revenue needed to carry on the functions and duties of the government. It is respectfully submitted that that is all Opelika has done here. The particular type or form of tax employed is the business privilege tax, but it does not appear that any different argument or theory of law would be brought into action if instead an income, property, or sales tax were involved.

In view of the emphasis petitioner has placed upon the decided cases involving the related question of the validity of municipal ordinances subserving a police power function, and the further fact that a thorough analysis of the decided law on the questions raised by this appeal requires consideration and reasoning by analogy of these cases, this brief will deal with those decisions at some length. However, sight should not be lost of the fact that the case at bar in no respect relates to regulatory or police power action of a municipal government, but is concerned only with the municipality's right to levy taxes in the manner set forth in the ordinance.

It has not, nor do we think it can be, successfully contended that those engaged in press activities or religious callings are *per se* relieved from the normal tax and regulatory burdens incident to orderly and successful government. If the tax legitimately is aimed at the production of revenue and is not, either obviously or subtly, a means of achieving an illegitimate, unconstitutional purpose; or, if the regulation serves a real police power function, and is not a disguised menace to Constitutionally protected liberties, it may exist and be enforced against those pursuing press activities as well as religious callings.

²⁰ Petitioner's Brief, p. 38.

" * * * The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. *Like others he must pay equitable and nondiscriminatory taxes on his business.*" (*Associated Press v. Labor Board*, 301 U. S. 103, 132-133) (Italics supplied)

This is axiomatic. One would hardly question that a news agent delivering papers by automobile must, like all others, secure license tags for his automobile, pay the prescribed tax and abide by all applicable regulations; marriages, though of vital religious significance, and in some instances an inseparable part of religious beliefs and sanctions can and regularly are regulated by municipalities under licensing ordinances, and parties wishing to be married may be required to tolerate a prescribed waiting period, or, in some cases, produce a certificate of freedom from venereal diseases before receiving a license.²¹ Similarly, polygamy, though proper under the tenets of certain religious beliefs, may be outlawed, notwithstanding the claim for protection against the invasion of the right of free exercise of religious beliefs.²² And though, as pointed out in *Manchester v. Leiby*, 117 F. (2d) 661, 666²³ and quoted by the Supreme Court of Alabama in *this case*, it might have been considered a gross impiety to members of one faith to be required to apply for a civil permit before partaking of a divine sacrament, under the National Prohibition Act (27 U. S. C. A. Section 1, *et seq.*), the use of the sacramental wine was properly made the subject of such regulation and permit (See *Shapiro v. Lyle*, D. C., 30 F. (2d) 971).

The ordinance adopted by the City of Opelika does not in any respect purport to prohibit petitioner, or anyone

²¹ *Peterson v. Widule*, 157 Wis. 641, 147 N. W. 779.

²² *Church of Jesus Christ of L. D. S. v. U. S.*, 136 U. S. 1; *Reynolds v. U. S.*, 98 U. S. 145.

²³ *Certiorari denied* 313 U. S. 562.

else, from publishing, distributing, or circulating literature pertaining to religion or any other subject or from engaging in the business of "book agent" or seller. Nor does it restrict in any sense his freedom to worship in whatever manner he sees fit. It has no such purpose deliberately, and it is patently false (if not somewhat anomalous) to say, as petitioner does, that:

"While casual consideration might lead one to believe that the ordinance in question is one of the 'ordinary forms of taxation for support of the government', yet a more careful consideration thereof conclusively shows that it is adroitly aimed, whether unwittingly or deliberately, at *circulation* and can be misused to utterly destroy distribution of literature containing information and opinion." (Petitioner's Brief, p. 27)

How one may adroitly aim to do something unwittingly is left unexplained.

The ordinance creates no conditions precedent to the issuance of the license save the payment of the tax. In the present case, petitioner, as a book agent, was required to pay \$10 for which, had he applied, he would unquestionably have received an annual license. There are no requirements concerning the qualifications of the applicant or of the books he wished to sell as to which the city had to be satisfied or could under the ordinance even consider. It had no alternative, had a license been sought, but to deliver the annual license upon receipt of the \$10 tax. So clear is the city's duty under the ordinance in this respect that it would be without legal authority to withhold issuance of the license upon the tender of the fee and undoubtedly mandamus would lie to enforce its delivery (*Marbury v. Madison*, 1 Cranch 137).

(2) Lovell v. Griffin and related Nuisance or Police Power Cases Not Only do Not Require a Finding that Opelika Ordinance is Bad, but Negatively Establish the Propriety Thereof.

Petitioner maintains that this Court has resolved all doubts on this subject, and has ruled unequivocally that a state or municipality may not affect, regulate or interfere with in any manner those engaged in press or religious activities, either in the exercise of its police power or its sovereign right to tax. We are told that this Honorable Court has settled the rule as to police power activity in *Lovell v. Griffin*, 303 U. S. 444, and as relating to the taxing power in *Grosjean v. American Press Company*, 297 U. S. 233. We think both of these leading cases and the decisions following them, by their very delineation between the permissible and prohibited acts of a municipal government, clearly support the validity of the tax which petitioner was required to pay before engaging in the calling of book agent in the City of Opelika.

Lovell v. Griffin, *supra*, is settled authority for the proposition that a state or municipal government, in adopting regulations for the health, safety, and welfare of its people, may not prohibit the sale of literature or exercise anything in the nature of a previous restraint or prior censorship over the publication, circulation or distribution of printed matter under a system of licensing, or by any other method. In that case, the City of Griffin, Georgia, was engaged not in routine business privilege taxing or licensing, but in affirmatively barring the distribution of "circulars, handbooks, advertising, or literature of any kind" as a nuisance unless specific permission from the City Manager had been obtained. The ordinance was not general in character but was directed *only* at the prohibition and curtailment of these activities. This, indeed, was something entirely different from the ordinance involved in the instant case. Here was no perfunctory issuance of licenses to engage in any business upon the payment of a fee, but rather a pro-

hibition directed against one thing, namely, the distribution of press material without prior governmental examination (censorship) and approval. Such an ordinance, like all of those that have been struck down in the other cases cited on this proposition by petitioner, was declared void on its face as striking "at the very foundation of the freedom of the press by subjecting it to license and censorship."²⁴

A few years later, this Court followed the doctrine of *Lovell v. Griffin* in *Schneider v. State*, 308 U. S. 147, holding a somewhat similar ordinance invalid, but took occasion to limit its view by stating that:

"We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires. Nor do we hold that the town may not fix reasonable hours when canvassing may be done by persons having such objects as the petitioner. Doubtless there are other features of such activities which may be regulated in the public interest without prior licensing or other invasion of constitutional liberty." (308 U. S. 147, 165)

And again in *Cantwell v. Connecticut*, 310 U. S. 296, this Court having before it an ordinance, not general in character but limited to the activities of a particular group, which gave authority to the secretary of a state public welfare council to determine in a given case whether or not an applicant for permission to solicit funds for a religious cause was in fact representing a religious cause before issuing a permit, properly decided that the ordinance permitted what amounted to prior licensing and restraint on

²⁴ To like effect are: *Kennedy v. City of Moscow*, 39 F. (2d) 26; *Reid v. Borough of Brookville, Pa.*, 39 F. (2d) 30; *Zimmerman v. Village of London*, 38 F. (2d) 582 (involving an absolute prohibition against soliciting without an invitation from the person solicited); *Donley v. City of Colorado Springs*, 40 F. S. 15 (likewise involving not a regulation of but a prohibition against soliciting); *State v. Woodruff*, 280 So. 577; *Commonwealth v. Reid*, 20 A. (2d) 841; *Wilson v. Russell*, 1 So. (2d) 569; *Village of South Holland v. Stein*, 26 N. E. (2d) 475; and others cited by petitioner, Petitioner's Brief, p. 33.

the free exercise of religion. The Court was careful to say, however, that:

"It is equally clear that a State may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." (310 U. S. 296, 304)

And this view of the Court, expressed in the form of dicta in the *Schneider* and *Cantwell* cases, formed the basis of the Court's opinion in *Cox et al. v. State of New Hampshire*, 312 U. S. 569, 61 S. C. Rep. 762 (decided March 31, 1941): There, a New Hampshire statute provided that parties desiring to parade through public streets must first secure a license and pay a prescribed fee. Certain Jehovah's Witnesses, ignoring the provisions of this statute, paraded through the streets of Manchester displaying signs bearing such legends as "Religion is a Snare and a Racket" and "Fascism or Freedom—Hear Judge Rutherford and Face the Facts," without securing a license or paying the fee required by the statute.

Holding that the government could, without impinging on constitutional rights, adopt such reasonable regulations pertaining to the use of its public ways, this Court said:

"If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state court contravened any constitutional right."

And an ordinance of the City of Manchester (also challenged by members of the Company of Jehovah's Wit-

nesses) requiring peddlers or canvassers to obtain a badge of identification prior to selling on the streets was found valid and not subject to the charge of unlawful restriction on the freedom of press or the free exercise of religion. In its opinion, the Circuit Court of Appeals, First Circuit, said:

"By contrast the Manchester ordinance now before us contains no element of prior censorship upon the distribution of literature. It requires only a simple routine act of obtaining a badge of identification before a person can sell on the streets. This reasonable police regulation, in our opinion, imposes no substantial burden upon the freedom of the press or the free exercise of religion.

"No doubt, as in the case of any regulatory law, there is the possibility (though the record indicates no likelihood of it) that officials might act arbitrarily and in excess of their rightful powers in administering the ordinance. The superintendent of schools might arbitrarily withhold licenses from Jehovah's Witnesses, despite his mandatory duty to issue the badges upon receipt of applications 'properly executed.' A license once given might be revoked upon some trumped-up pretext. By Section 3, the badgeholder is required to conform to the ordinances of the city and the regulations of the board of mayor and aldermen; some outrageous regulation might be issued, and for non-compliance with it a license might be revoked under Section 4. What the legal situation would be if any of these or other possibilities came to pass need not be examined now. It suffices to say that recognition of such possibilities does not render the ordinance void on its face, nor justify an injunction at the behest of persons who have failed to take the simple step of applying for a badge—a badge which, so far as the record indicates, would have been issued out of hand, as a matter of routine ministerial duty." *City of Manchester et al. v. Leiby*, 117 F. (2d) 661, 666.

On April 7, 1941, this Court denied certiorari (313 U. S. 562, 61 S. C. Rep. 838).

Thus, it will be seen, so far as police regulations having to do with this subject are concerned, if the Court has before it that which purports to be an honest effort by the governmental agency to protect and provide for the health, safety and general welfare of all persons under its jurisdiction, in the absence of a showing that it is, in fact, a pernicious attempt to curtail, prohibit or restrain the rights protected to persons under the Fourteenth and First Amendments of the Constitution, then such regulations are declared to be valid notwithstanding the fact that they may to some extent bear a relationship to the press or religious activities of persons involved. Conversely, the Court will not permit deliberate invasions into the fundamental rights secured to all persons under the Constitution through the guise or camouflage of police regulations. It is respectfully submitted that there are no facts in the record which could conceivably support an analagous contention that the tax in the case at bar had that effect.

An effort has been made to confuse the ordinance in the *Lovell* case with that involved in the case at bar, the reasoning advanced being that since both employ the term "license" they must *ex necessitati* relate to the same thing, namely, governmental licensing and censorship so obnoxious to our form of government. This reasoning fails to recognize the many different senses in which the work "license" can be used. As employed in the ordinance in the *Lovell* case it did connote prior censorship, examination of material and ultimate permission or refusal to distribute based thereon. However, as used by the City of Opelika in its "City License Schedule of 1939" it is employed for little purpose other than to designate the fee charged with respect to the various avenues of endeavor listed.²⁵ Certainly

²⁵ Indeed, with marked frequency the word "license" is employed throughout the ordinance as though it were synonymous with the words "fee" or "tax". E. g.,

• • • • half of such license shall be charged and collected,
• • • • (Sec. 2)

it implies nothing so sinister as a previous restraint on the business of publishing and distributing press material. Such was the holding of the Supreme Court of Arizona in *Giragi v. Moore*, 48 Arizona 33, 110 A. L. R. 314, 323, when it said:

"First, it is said that the requirement that persons obtain a license before engaging or continuing in a business subject to the tax is a previous restraint on such business, in this case on the business of publishing a newspaper. No condition except payment of a license fee is attached to the issuance of the license. All persons who pay the fee are entitled to receive a license and for whatever location it may be applied for. * * *

"It is said that, 'where the fee is exacted solely or primarily for revenue purposes and payment of the fee gives the right to carry on the business or occupation without the performance of any further conditions, it is not a license fee but a tax imposed under the power of taxation, regardless of the name by which it may be called.' 37 C. J. 170, Sec. 6."

And in the case of *Donnelly Corporation v. City of Bellevue*, 283 Ky. 152, 140 S. W. (2d) 1024, the Court of Appeals of Kentucky said this of a similar licensing ordinance:

"We construe the term, however, not in the sense of being a grant or permission, but as descriptive of the tax and the document evidencing its payment. The penalty prescribed is not for distributing advertising matter, but for exercising the privilege without paying the tax. * * *

"* * * the City of Opelika shall have a lien for such license, * * * as of the date the license is due, * * * (Sec. 5)

"* * * shall pay the same license for such vocation, exhibitions or profession * * * (Sec. 6)

"* * * who shall thereon fix a reasonable license for such business or vocation * * * (Sec. 12)

"* * * shall pay such license on or before the day such business or vocation is actually begun * * * (Sec. 13)

"All licenses will become delinquent * * * and an amount equal to 10 per cent of the amount of such license will be added * * * (Sec. 14) (Italics supplied)

(3) The Grosjean Case and Those Following its Doctrine, Likewise Add to Rather than Detract from the Validity of Respondent's Position.

The *Grosjean case*, *supra*, relied upon by petitioner with as much finality as accompanies his presentation of the *Lovell case*, is authority for sustaining the tax in the case at bar. By pointing out the type of tax which may not be levied against press activities or, for that matter, any activity protected by the Fourteenth Amendment, it clearly demonstrates that the Opelika tax on book agents is valid. Had the State of Louisiana levied a general sales or license tax against all businesses, vocations, trades, and professions in the state, and set up a rate to be applied on newspapers, no constitutional question would have been involved. That is not what was done, however. As is now well known and has been judicially pointed out, the tax in the *Grosjean case* was the result of a deliberate political persecution of a hostile press:

"It is a notorious fact that at the time the Grosjean case was decided, a situation existed in the state of Louisiana which was unparalleled in American history. A single individual had obtained a control over the entire executive, legislative and judicial machinery of that state as absolute as that exercised by any modern European dictatorship. * * * There was, however, a minority at least in that state, who were bitterly opposed to that dictatorship, and who were endeavoring to call the attention of the citizens to the situation, * * *. The only practical means which they had of presenting their cause to the people was through the press. The great majority of the larger newspapers of the state were opposed to the existing political set-up, while many, if not most, of the smaller periodicals took an opposite attitude. With this background, the statute involved in the Grosjean case was adopted. It imposed on all newspapers published in the state with a circulation of over 20,000 what was called a license tax for the privilege of doing business, and which amounted to 2% of the gross income of such papers, leaving untaxed all newspapers with a lesser circula-

tion. . . .” (*Giragi v. Moore*, 48 Ariz. 33; 110 A. L. R. 314, 325-326)

As applied to the newspapers that protested against the enforcement of this law, it imposed a tax of 2 per cent on the gross receipts derived from advertising carried in their newspaper when and only when each enjoyed a circulation of more than 20,000 copies a week. The tax stood alone, included no other business enterprises and was directed solely at these newspapers. Actually, in operation, it was limited in applicability to but thirteen newspapers out of a total of one hundred sixty-three in the state, of which thirteen, twelve were active in opposition to the dominant political group in the state, which group controlled the legislature and at whose dictates the legislature passed the law.

On this highly aggravated state of facts, this Honorable Court found the law to be obnoxious to the Fourteenth Amendment of our Constitution. Again, as in the cases involving the exercise of police power, this Court was careful to state:

“It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press.” (*Grosjean v. American Press Co.*, *supra*, p. 250)

Significantly, the Court added:

“The tax here involved is bad not because it takes money from the pockets of the appellees. If that were all, a wholly different question would be presented. It is bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties.” (*Grosjean v. American Press Company*, *supra*, p. 250)

The "wholly different" situation thus referred to by Mr. Justice Sutherland is the case at bar. It also was the situation present in *Giragi v. Moore*, 48 Arizona 33, 110 A. L. R. 314. There the State of Arizona levied a general privilege or sales tax based upon gross income "of practically every person or concern engaged in selling merchandise or services in the state." (110. A. L. R. 322). The Arizona law, although different from many practical standpoints, is strikingly similar to the ordinance involved in the case at bar as far as constitutional questions are presented. For example, Section 11 of the law "provides that every person engaging or continuing in a business required to pay the tax shall apply for and obtain a license. * * *" and "that parties failing to procure such license or display it shall be punished by a fine of not less than \$10 or by imprisonment * * *". As in the instant case, it was there charged that the requirement that persons obtain a license before engaging in press activities amounted to a previous restraint made unlawful by the Fourteenth Amendment. The Arizona Supreme Court, finding the case distinguishable from *Grosjean v. American Press Company*, *supra*, and following the general rule which provides no immunity from ordinary forms of taxation to those engaged in press activities, found the tax valid. The court said:

"No condition except payment of a license fee is attached to the issuance of the license. All persons who pay the fee are entitled to receive a license and for whatever location it may be applied for. The amount of the fee is fixed and unvarying and is paid but once * * *. It is said that 'where the fee is exacted solely or primarily for revenue purposes and payment of the fee gives the right to carry on the business or occupation without the performance of any further conditions, it is not a license fee but a tax imposed under the power of taxation, regardless of the name by which it may be called.' 37 C. J. 170, Sec. 6."

Finally, dealing with the *Grosjean* case, the court said:

"What the court said, and what it meant to say evidently, was that the tax there being discussed was not one of the ordinary forms of taxation but extraordinary. The tax is 'single in kind' and extraordinary, not only in the respects mentioned by the court, but because the newspapers paying it cannot pass it on to the ultimate consumer without losing him to competing newspapers not paying the tax. It is a cleverly devised scheme under the guise of taxation to punish enemies and reward friends. In *Commonwealth v. Boston Transcript Company*, 249 Mass. 477, 144 N. E. 400, 402, 35 A. L. R. 1, 6, it is said: 'they (newspaper publishers) have no special immunities.. They do not constitute a privileged class. They are entitled to invoke constitutional guaranties in common with others.' The rule contended for would certainly place the publishers of newspapers in a favored class. It would permit the taxing of all other businesses upon their sales or gross income and exempt newspapers and other publications. The Supreme Court would have to say in the plainest and most unequivocal language that the burden of taxation should not be borne by the press and all others taxed before we would believe that court intended such a rule. Certainly it has not so stated in the *Grosjean* case. * * *

"The mere fact that a tax reduces a person's net income is no legal restraint on him or his business. If the taxpayer is a newspaper publisher, it must appear that the law not only 'takes money from the pockets,' but also that the law was adopted by the state as a 'form of previous restraint upon printed publications, or their circulation.' If it is so adopted, then, however small the tax may be, it is bad and in violation of due process. It is not the amount of the tax, but the use of it as a means to abridge the freedom of the press, that is forbidden. The adoption of chapter 77, *supra*, was for the sole purpose of raising revenue and is, therefore, not within the spirit of the prohibition of the Fourteenth Amendment against depriving one of the fundamental right of due process."

When the Supreme Court of the United States was asked to review the action of the Arizona Supreme Court, it rendered a *per curiam* decision:

"The appeal herein is dismissed for the want of a substantial federal question. *Grosjean v. American Press Co.*, 297 U. S. 233, 250; *Associated Press v. National Labor Relations Board*, ante, p. 103. * * * (Giragi, et al. v. Moore, et al, 301 U. S. 670)

Again, in *Arizona Publishing Company v. O'Neil, et al.*, 22 F. Sup. 117, affirmed 304 U. S. 543, this taxing statute was attacked on the grounds of its alleged tendency to restrain a free press. The District Court said:

"Plaintiff's contention is not new. The same contention was made in *Giragi v. Moore*, 64 P. (2d) 819; 110 A. L. R. 314, and was by the Supreme Court of Arizona unanimously rejected. An appeal from that decision was dismissed by the Supreme Court of the United States 'for the want of a substantial federal question'. 301 U. S. 670, 57 S. Ct. 946, 81 L. Ed. 1334. With the views expressed by Judge Ross in the main opinion and by Judge Lockwood in his concurring opinion in the Giragi case, we are in complete agreement. To repeat here what was said there would serve no useful purpose."

And recently in the case of *Donnelly Corporation v. City of Bellevue*, 283 Ky. 152; 140 S. W. (2d) 1024 (decided May 21, 1940), involving an ordinance requiring a \$25 privilege license for the distribution of pamphlets and circulars, the Court of Appeals of Kentucky distinguished the *Lovell case*, *supra*, and upheld the right of the community to impose the license requirement, pointing out that the ordinance involved constituted an imposition of a tax rather than an abridgment of the right of free speech, and therefore lawful. The Court said:

"There is, however, a clear distinction between the ordinances held by the Supreme Court to be abridgments of the right of free speech and press and the

ordinance before us. It does not undertake either to prohibit or restrict the distribution of literature of any sort. It only imposes a tax upon the privilege of carrying on the business of advertising in a particular manner. Absent from the ordinance is any censorship of substance or form. No power of discrimination as between any persons or class of citizens is reserved or exercised. The privilege of distributing advertising matter is available to any one paying the tax. True it is that a license is required. We construe the term, however, not in the sense of being a grant or permission, but as descriptive of the tax and the document evidencing its payment. The penalty prescribed is not for distributing advertising matter but for exercising the privilege without paying the tax. * * *

Petitioner's attempted avoidance of the impact of this case on the basis that the material in the pamphlets circulated carried an advertising message rather than, as he puts it, "informative material" is not sound for it implies a limitation on free speech that does not exist. The mere fact that the ordinance speaks only in terms of advertising matter rather than literature generally does not in any respect lessen the forcefulness of the decision from the standpoint of the right of a community to affect, by proper legislation, the distribution, publication or circulation of printed matter. The following from the decision makes that clear:

"If the right of the state or a municipal subdivision merely to exact a reasonable license tax for the privilege of carrying on the business of distributing advertising matter, or even of publishing a newspaper, for private profit, be denied as an abridgment of freedom of speech or press, then there is a clash with the fundamental social and political philosophy and constitutional mandate of equality of right and equality of burden. * * *" (140 S. W. (2d) p. 1026)

No later than October 13, 1941, the day on which certiorari was granted in the case at bar, this Court denied certiorari in the case of *Cole v. City of Fort Smith*, 151

S. W. (2d) 1000.^{25a} There, the Supreme Court of Arkansas sustained the doctrine that a municipality may, in adopting a general taxing law, levy a license fee or tax on those who would sell or offer for sale books, pamphlets or other periodicals. In that case, the defendant was convicted of the violation of an ordinance which provided:

"Section 1. That the license hereinafter named shall be fixed and imposed and collected at the following rates and sums and it shall be unlawful for any person or persons to exercise or pursue any of the following vocations of business in the City of Fort Smith, Arkansas, without first having obtained a license therefor from the City Clerk and having paid for the same in gold, silver or United States currency as hereinafter provided * * *. Section 40. For each person peddling dry goods, notions, wearing apparel, household goods or other articles not herein or otherwise specifically mentioned \$25.00 per month, \$10.00 per week, \$2.50 per day * * *."

The defendant was found guilty of having carried on the business of selling religious books at 25 cents per copy without first paying the prescribed tax and procuring the license. The Arkansas Supreme Court held that *Lovell v. Griffin, supra*, was clearly distinguishable and that the tax involved was a valid business privilege tax from which the Constitution of the United States grants no immunity for one engaged in a religious calling. The Court said:

"Under this ordinance these two appellants were charged with carrying on the business of peddling religious books at twenty-five cents per copy without first having procured a license. We think it clear that this ordinance is broad enough to embrace the character of goods, under the term 'other articles,' that appellants were peddling, under the facts presented. We think it can make no difference as to what motives, religious or otherwise, that may have prompted appel-

^{25a} Reported in the Supreme Court of The United States as *Bowden and Sanders v. City of Fort Smith, Arkansas*, 46 L. Ed. (Adv. Sheets), 80.

lants to peddle these books. We think there is no inhibition in the Constitution of the United States against the imposition of the license imposed by the ordinance in question. A similar question was presented in the case of *Cook v. City of Harrison*, 180 Ark. 546; 21 S. W. (2d) 966, 967, in which one of Jehovah's Witnesses had appealed from a conviction of violating an ordinance of the City of Harrison, the applicable provisions of which were: 'That it shall be unlawful for any person or persons to engage in, exercise or pursue any of the following avocations or businesses without first having obtained and paid for a license therefor from the proper city officials, the amount of which license is hereby fixed as follows, to wit . . . Section 13. For each book, picture or picture frame peddler, five dollars (\$5.00) per month, or twenty-five dollars (\$25.00) per year. . . . Section 31. Whoever shall engage in any business for which a license is required by this ordinance without first obtaining and paying for same as above required, shall be deemed guilty of misdemeanor, and upon conviction shall be fined in any sum not exceeding three hundred dollars (\$300.00).

"The facts in the Harrison case are in all respects similar to those presented here. There this Court said: 'The gist of appellant's contention for a reversal of the judgment is that the ordinance does not forbid the hawking or peddling of religious tracts or books, especially if the parties distributing them are prompted by religious motives. We find no such exception in the ordinance. No distinction appears in the ordinance between the character of books distributed or the motives prompting the distribution thereof.' The Constitution of the state authorizes the imposition of a tax or license on hawkers or peddlers irrespective of the kind of goods, wares, or merchandise distributed by them, and there is no inhibition in the Constitution of the United States against the imposition of a tax or license upon them. The imposition of such a tax is not an abridgment of religious freedom or an infringement upon the constitutional guaranty of religious liberty.'

"We do not think the case of *Lovell v. Griffin*, 303 U. S. 444; 88 S. Ct. 666; 82 L. Ed. 949, controls here. The provisions of the ordinance considered there were

materially different from the one before us. We think the case of *Cook v. City of Harrison, supra*, controls here and that the ordinance under which appellants, Lois Bowden and Lada Sanders, were convicted is valid and constitutional and must stand. * * * (151 S. W. (2d) 1000, 1003)

The cases of *Semansky v. Stork*, 199 S. 129, *State v. Meredith*, 15 S. E. (2d) 678, *Thomas v. City of Atlanta*, 1 S. E. (2d) 598, and like decisions, cited by petitioner do not go beyond holding under each individual set of facts therein involved that the Jehovah's Witness before the court was not a peddler within the meaning of the particular statute. Here there can be no question but that petitioner was found to be a "book agent" within the meaning of the ordinance. The testimony on which he was convicted was that he was offering certain pamphlets or books for sale—two for five cents. Nothing appearing on the pamphlets themselves negatives the conclusion that sales of the books were attempted and made.²⁶ Thus, not because petitioner sub-

²⁶ The pamphlets themselves contain various advertising material with respect to other publications, such as coupons reading:

"Watch Tower, 117 Adams St., Brooklyn, N. Y. Please send me the magazine *The Watchtower* for one year together with the book and the booklet *Face the Facts*. Enclosed is my voluntary contribution of \$1.00 toward the wider publication of the Kingdom Message.

Name

Address

City and State

This special offer expires April 30, 1939."

And at another place, after listing the titles of other books—

"All in attractive cloth binding, cover embossings, gold lettered illustrated in color, indexed, and each of 352 or more pages of Scripture and facts. All sixteen books on your subscription of \$4.00; any four \$1.00; single book, 25¢ sent to you anywhere postage prepaid by us. For free illustrated booklet describing the above and all other publications by Judge Rutherford write to

The Watch Tower, 117 Adams Street, Brooklyn, N. Y."

scribed to certain religious beliefs, or, because he was selling or attempting to sell books in Opelika, but, because he engaged in the business or calling of book agent, in Opelika, without paying the tax due, he was arrested and convicted. It is not our point that free speech, press or religion will be protected only when no charge in connection with the exercise thereof is made, but rather that when the exercise of these rights coincides with a commercial enterprise, laws and non-discriminatory taxes relating thereto apply.

And the case of *State of Vermont v. Elva Greaves*, ——— At. (2d) ——— (decided November 5, 1941), authoritatively relied on by petitioner is obviously inapplicable as a guide to the Court's decision in the case at bar if for no other reason than that the ordinance there involved contained a provision not unlike that in the *Lovell case*, *supra*, requiring the license board to satisfy itself upon "satisfactory proof" that the applicant for a license "is of good moral character and reputation". Section 5 of that ordinance provides as follows:

"Sec. 5. Before a license shall be granted a written application shall be presented to the license board signed by the applicant. In it the applicant shall state his place of residence, with street and number, the particular kind of a license he desires, and that he will observe the conditions of his license and all provisions of the ordinances governing same, and the applicant shall present satisfactory proof to said license board that he is of good moral character and reputation. The applications shall be filed in the office of the city clerk."

And elsewhere after a list of available pamphlets—

"Any thirteen you select, on a contribution of 50¢, any six, 25¢; any one, 5¢, and mailed to your address postpaid."

"Enemies," another publication, is advertised as a "book of 384 pages, beautifully bound in cloth. • • •"

(4) The License Requirement Being Valid on Its Face Required Observance, and Petitioner Cannot be Heard to Complain of a Revocation Clause in no way Prejudicing Him.

The requirement that petitioner pay for and secure a license to engage in the calling of book agent was valid on its face and petitioner's conduct in offering books for sale without securing such license subjected him to the penalties set forth in the ordinance. He is in no position to "complain because of his anticipation of improper action in administration" (*Smith v. Cahoon*, 283 U. S. 553). See also *Lehon v. Atlanta*, 242 U. S. 53.

Petitioner charges that Section 1 of the ordinance, which provides for revocation of licenses in the discretion of the City Commission "with or without notice to the licensee," is invalid and for that reason petitioner was entitled to ignore the ordinance *in toto*. It does not appear necessary or proper to go into the question of the validity or invalidity of that provision, since no license having been sought or obtained by petitioner the question of the validity of that section of the ordinance having to do with revocation thereof is not germane. *Ex Parte Byrd*, 84 Ala. 17, 4 So. 397; *Little v. City of Attala*, 4 Ala. App. 287, 58 So. 949. Its invalidity could only be of significance if the section were inseparable, thus rendering the entire ordinance void. *Smith v. Cahoon*, *supra*.

Section 1, however, is separable from the ordinance, and if invalid does not vitiate the whole. The ordinance contains a section which provides:

"Should any section, condition, or provision [sic] or any rate or amount scheduled as against any particular occupation exhibited in the foregoing schedule be held void or invalid, such invalidity shall not affect any other section, rate or provision of this license schedule." (R. 38)

It is now well settled that a provision such as this creates the presumption that, eliminating invalid parts, the legislature would have been satisfied with the remainder, and reverses any presumption that the legislature intended the act to be effective as an entirety or not at all. *Champlin Refining Co. v. Corporation Commission*, 286 U. S. 210; *Electric Bond and Share Co. v. Securities & Exchange Commission*, 303 U. S. 419.

Furthermore, irrespective of the separability clause, it is otherwise clear that the legislative intent, namely, to create a schedule of taxes and fees assessable against those engaging in business in Opelika, is fully carried out to all intents and purposes even though Section 1 were struck down. To preclude revocations without notice does not alter the principle aim of the ordinance. Nor does it make obscure that about which the legislature intended to legislate.

Brazee v. Michigan, 241 U. S. 340.

Railroad Retirement Board v. Alton, 295 U. S. 330.

Carter v. Carter Coal Co., 298 U. S. 238.

See also:

Sloss-Sheffield Steel & Iron Co. v. Smith, 175 Ala. 260; 57 So. 29.

Ex Parte Bizzell, 112 Ala. 210, 21 So. 371.

Mayor and Aldermen of Birmingham v. Alabama Great Southern Railroad Co., 98 Ala. 134.

Lowndes County v. Hunter, 49 Ala. 507.

In *Electric Bond & Share Co. v. Securities & Exchange Commission*, 303 U. S. 419 (decided March, 1938), the petitioner was not permitted to attack the constitutionality of the registration provisions of the Public Utility Holding Company Act by contending they were inseparably connected with allegedly invalid regulatory provisions not yet employed by the Commission. This Court upheld the registration provision without regard to the regulatory provisions because it found that Congress had a definite purpose

in the registration itself unaffected or changed by the regulatory sections.

The present case presents a parallel situation. The principal purpose of the ordinance is the scheduling and collection of the prescribed fees. This aim is unaffected by the procedural section dealing with revocations and consequently is left intact even though Section 1 were found to be invalid.

CONCLUSION.

We respectfully submit that

- (1) The appeal should be dismissed for want of jurisdiction; but if not
- (2) The decision of the Supreme Court of Alabama should be affirmed.

Respectfully submitted,

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CHARLES F. CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 280.

ROSCO JONES,

Petitioner,

against

CITY OF OPELIKA,

Respondent.

**BRIEF OF AMERICAN CIVIL LIBERTIES UNION
AS AMICUS CURIAE.**

AMERICAN CIVIL LIBERTIES UNION
As Amicus Curiae.

OSMOND K. FRAENKEL,
New York City, N. Y.,
JAMES A. SIMPSON,
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of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 280.

ROSCO JONES,
against

Petitioner,

CITY OF OPELIKA,

Respondent.

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE.

The American Civil Liberties Union is interested in this case because it believes that it presents to this Court certain important constitutional problems with regard to the extent to which restrictions may be imposed upon the dissemination of ideas.

The basic question is whether a municipality, under the guise of collecting license fees for the carrying on of various occupations, may require the taking out of such a license and the payment of a fee by any person who, even on a single occasion, offers for sale a pamphlet containing an expression of opinion.

This Court has already held, in a group of cases known as *Schneider v. Irvington*, 308 U. S. 147, that restrictions may not be imposed upon the free distribution of expressions of opinion on the public streets. The question then

to be decided here is whether such restrictions can be imposed because a price is demanded.

We do not believe that the broad considerations of policy which led this Court so to decide were affected by the circumstance that in those cases distribution was free.¹ The basic consideration which guided this Court was the importance of the distribution of "information and opinion." That pamphlets of various kinds have in the past played an important part in our history is well established and has been recognized by this Court.² Surely this Court did not mean to confine its observations to pamphlets distributed free. For, as was pointed out in *Commonwealth v. Reid*, 20 A. 2d (Pa.) 841, the famous pamphlets of our history were not circulated without charge, but were either distributed to subscribers or were sold on the streets. Paine's *Commonsense*, for instance, was originally published to be sold at 2 s.; and his *American Crisis* was also not given away, for it produced profits which he dedicated to the service of the American Revolution (see Introduction to Paine's Political Writings, London, 1909, pp. 3, 5).

That pamphlets continue to be of importance in the instruction of the public and the formulation of public policy can hardly be doubted. Indeed, under modern conditions pamphlets are even more essential for such purposes, since it has become increasingly difficult, by reason of technical requirements and expense, to establish newspapers.

No valid reason exists for making any distinction between free distribution, distribution accompanied by solicitation for contributions, as in the *Schneider* case, or distribution, as here, accompanied by a fixed price demanded for each pamphlet distributed. To make such distinction

¹It may be noted that in the *Schneider* case itself a voluntary contribution was requested by the distributor; this apparently was not considered significant.

²*Grosjean v. American Press Company*, 297 U. S. 233, 245; *Lovell v. Griffin*, 303 U. S. 444, 452; *Thornhill v. Alabama*, 310 U. S. 88, 97.

would militate against groups desirous of spreading their views who lack financial means; it would facilitate propaganda by the rich and powerful, who are more readily able to use existing means of communication, such as the newspapers and the radio; it would discriminate against those groups in the community least able to make their voices heard through these more conventional media. Surely this Court will not sanction such discrimination.

That distribution of pamphlets should be unrestricted, even though a price be exacted for them, has been widely recognized. In many cases the courts have held laws unconstitutional in so far as an attempt was made to include within their scope the sale of printed matter which consisted of expressions of opinion:

Zimmerman v. Village of London, 38 F. Supp. 582;

Reid v. Borough of Brookville, 39 F. Supp. 30;

Donley v. City of Colorado Springs, 40 F. Supp. 15;

*State ex rel. Hough v. Woodruff*³, 2 So. 2nd (Fla.) 577;

Thomas v. City of Atlanta,³ 59 Ga. App. 520;

Village of South Holland v. Stein, 373 Ill. 472;

Herder v. Shahadi, 125 N. J. L. 153;

People v. Banks, 168 N. Y. Misc. 515;

City of Cincinnati v. Mosier, 61 Ohio App. 81;

Commonwealth v. Reid, 20 A. 2nd (Pa.) 841;

*State v. Meredith*³, 15 S. E. 2nd (S. Car.) 678;

State v. Greaves, 22 A. 2nd (Vt.) 497.

See also *State ex rel. Semansky v. Stark*, 196 La. 307, and *People v. Finkelstein*, 170 N. Y. Misc. 188, in which

³In these cases the Court relied rather on the guaranty of religious freedom than on that of freedom of the press.

ordinances were construed not to cover the sale of religious or political tracts.

We submit that there is no merit to the various considerations to the contrary relied upon in the case at bar by the Supreme Court of Alabama. That Court thought (6, 7) that the decision of this Court in *Cox v. New Hampshire*, 312 U. S. 569, was controlling. But in that case this Court was not concerned with the distribution of expressions of opinion, but with the right to use the public streets for the purpose of parade, an entirely different matter. It is one thing to say that a municipality may have the right to require permits for the holding of parades; for these always inconvenience large portions of the public, and it is important that there be no conflict between two parades scheduled for the same time and place. It is quite another thing to say that a municipality may have the right to restrict the distribution of pamphlets constituting expressions of opinion on the public streets merely because a price is asked for the same.

For it cannot be doubted that the enforcement of ordinances of the type here under review would seriously restrict the dissemination of opinion. It is not altogether clear under which occupation listed in the ordinance petitioner was supposed to come, whether he was considered a book agent (required to pay \$10 a year [26]) or a transient agent (required to pay only \$5 a year [38]). It can readily be seen that were any large number of communities to impose license fees of this character the work carried on by petitioner and his associates would become impossible. They would either have to abandon any attempt to collect money in connection with the distribution of their literature or pay thousands of dollars a year in license fees. Moreover, it would be possible for communities which disliked their activities to prevent them altogether, either by delaying granting licenses, there being nothing in this ordinance requiring the immediate issuance

of a license, or by revoking licenses without notice, which the City Commission is expressly given the right to do (22).

In this respect the ordinance before this Court is quite different from the ordinance in *City of Manchester v. Leiby*, 117 F. 2nd 661, certiorari denied 313 U. S. 562, a case relied upon by the Alabama Supreme Court (7). In that case no license was required, but merely that each vendor obtain an identification badge, for which a deposit of 50¢ was to be paid, returnable upon the surrender of the badge. Moreover, the ordinance made it mandatory that a badge be issued immediately upon receipt of an application. The language of the Circuit Court of Appeals approving the ordinance must be read in the light of these particular facts. Moreover, the discussion with regard to the validity of the ordinance was not necessary to the decision, since it might well have rested upon the fact that there an action was brought to restrain the enforcement of the ordinance. This is made clear from the decision of the same Court in *Hannan v. City of Haverhill*, 120 F. 2nd 87, certiorari denied 314 U. S. —. There the Court ruled that it was not necessary to decide a doubtful question with regard to the constitutionality of the ordinance in an action to enjoin the same, citing the *Leiby* case. It held that the proper way that such question should be raised was by an appeal from a conviction in the State Court, particularly since the constitutional question might never arise because of the manner in which the ordinance might be construed by the highest court of the state.

Nor is *Ex parte Stein*, relied upon by the Alabama Court (9) pertinent here, for in that case no question of distribution of expression of opinion was involved. None of the cases cited by the Alabama Supreme Court, therefore, throw light on the problem now before this Court.

It is important to observe that no regulation of the use of the streets is really involved in this case. There is no

evidence to support any inference that petitioner sought to establish himself upon the public streets in any particular place for the purpose of carrying on a business there. In that respect this case differs entirely from *Commonwealth v. Pascone*, 1941 Mass. Adv. Sheets 713, certiorari denied 314 U. S. —. There the Massachusetts Court expressly held that the ordinance was not aimed at persons "simply going about from place to place." That ruling constituted such a construction of the ordinance as to make it clear that what was attempted was the regulation of a business, not a restriction upon the dissemination of opinion. However, in the case at bar the Supreme Court of Alabama did not limit its approval of the ordinance in any similar manner. Nor was there any evidence which would have supported a conviction under an ordinance so restricted.

That an ordinance of the type involved in the case at bar is not regulatory in any true sense was recognized by the Supreme Court of Vermont in *State v. Greaves*, supra. That Court held that the imposition of a license fee was a restraint upon circulation within the *Grosjean* case, supra, as well as within the *Lovell* and other cases already cited herein.

Moreover, the ordinance has a provision which permits revocation of a license in the unregulated discretion of the State Commission (22) and is, accordingly, substantially identical with the ordinance condemned by this Court in the *Lovell* case. For it can make very little difference in practical effect whether the discretion is exercised before the granting of the license or immediately afterward. This was recognized in the Court of Appeals of the State of Alabama, which reversed the conviction primarily on that ground (64).

Respondent has argued that the ordinance can be sustained as a tax under the statements of this Court in the *Grosjean* case, supra, and in *Associated Press v. National*

Labor Relations Board, 301 U. S. 103, 133. Respondent in this connection relies also on *Giragi v. Moore*, 48 Ariz. 33, 49 Ariz. 74, appeal dismissed 301 U. S. 670, and on *Arizona Publishing Company v. O'Neil*, 22 F. Supp. 117, affirmed per curiam 304 U. S. 543. There can, of course, be no doubt that persons engaged in commercial enterprises, which involve the distribution of organs of opinion, cannot claim exemption from taxes generally imposed. And the Arizona statute involved in the two cases relied upon by respondent comes within that general category. For there the State imposed a general sales tax on the gross proceeds of business carried on in the state. The tax was not directed at the distribution of opinion.

But the ordinance now before the Court is of an entirely different character. If it be construed as a tax at all, it is an occupation tax, and, as applied to this petition, a tax on the sole occupation of distributing on the public streets leaflets constituting expressions of opinion. It cannot be doubted that had the municipality sought to enforce this ordinance against a person who was freely distributing leaflets of that character, this attempt would have been void. For this Court has held the right to distribute such leaflets to be protected by the Fourteenth Amendment. Any attempt to tax the exercise of such right would, therefore, be a tax on a privilege guaranteed by the United States Constitution and invalid. See *Colgate v. Harvey*, 296 U. S. 404; *Crandall v. Nevada*, 6 Wall. 35.

We have already pointed out that the circumstance that a price was asked for the leaflet distributed in the case at bar can make no difference in the application of the fundamental constitutional principle. We are not dealing here with a commercial enterprise such as was involved in the two Arizona cases, but with a person whose sole occupation it is to spread the truth as he sees it, sometimes asking for a contribution, at other times, as in the

⁴The overruling of that case in *Madden v. Kentucky*, 309 U. S. 83, does not affect the principle here contended for.

case at bar, asking for a flat price for each leaflet distributed. We do not believe that the statements which this Court has made with regard to the liability of newspapers to pay ordinary taxes were intended to permit the taxation of persons situated as is this petitioner.

We submit, therefore, that the conviction should be reversed and the ordinance held invalid. We believe that this Court should make it clear that the constitutional protection extends to all forms of distribution of opinion and information, that the same cannot be prohibited or taxed, that the circumstance that money is asked, whether directly or otherwise, is entirely immaterial. That will still leave to the states and their municipalities full power to regulate the use of the streets so as to prevent the usurpation of the same, either by a particular individual seeking to establish himself in business at a particular place, as in the *Pascone* case, or by a group of individuals seeking, by the device of a parade, to occupy the whole street, as in the *Cox* case. Whether a municipality can go further and require distributors on the streets to obtain some badge of identification upon the making of a nominal deposit for the same, as in the *Leiby* case, need not be decided at this time. Clear it is, however, that to permit municipalities to exact license fees for the distribution or sale of pamphlets on the public streets would effectively restrict and in many cases make impossible such distribution. And it can make no difference that in a particular case the amount charged may be relatively small. Nor can the ordinance in the case at bar be viewed an isolated one, as the increasing number of similar cases indicates.

The effect of upholding an ordinance of this kind on the distribution of literature is bound to be catastrophic. No considerations of state public policy require such result. For, as already noted, this ordinance is not really regulatory at all. This is, therefore, one of those situations in which this Court should be "astute" to examine the effect of the legislation attacked (see *Schneider v.*

Irvington, supra). So viewed, the ordinance must, as applied to this petitioner, be held unconstitutional.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION

As Amicus Curiae.

OSMOND K. FRAENKEL,
New York City, N. Y.,

JAMES A. SIMPSON,
Birmingham, Ala.,
of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

No. 280

ROSCO JONES, *Petitioner*

v.

CITY OF OPELIKA, *Respondent*

ON CERTIORARI TO THE
SUPREME COURT OF ALABAMA

**SUGGESTION THAT JURISDICTIONAL DEFECT
HAS BEEN SUPPLIED, and PETITION FOR
REHEARING AND INCIDENTAL RELIEF**

HAYDEN C. COVINGTON
Attorney for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

No. 280

ROSCO JONES, *Petitioner*

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ON CERTIORARI TO THE
SUPREME COURT OF ALABAMA

**SUGGESTION THAT JURISDICTIONAL DEFECT
HAS BEEN SUPPLIED, and PETITION FOR
REHEARING AND INCIDENTAL RELIEF**

MAY IT PLEASE THE COURT:

Comes now your petitioner and respectfully shows to the Court:

That this Court on October 13, 1941, granted to your petitioner a writ of certiorari directed to the Supreme Court of Alabama and that this cause was argued before this court on February 5, 1942. On February 9, 1942, this court rendered an order dismissing the writ "for want of final judgment" as stated in *per curiam* opinion of such date.

Thereafter petitioner duly filed his application for extension of time in which to file a motion for rehearing.

On March 5, 1942, this court granted petitioner to and including April 20, 1942, to file his motion for rehearing. On April 20, 1942, this court ordered the time extended to May 10, 1942, in which to file his motion for rehearing.

Immediately after the order of this court of March 5, 1942, extending the time for motion to be filed, petitioner filed a petition with the Alabama Supreme Court to amend its judgment of May 22, 1941. The Supreme Court of Alabama refused to consider said motion; but, on its own motion, issued a mandate to the Alabama Court of Appeals with direction to affirm the judgment of the trial court.

On March 9, 1942, the Alabama Court of Appeals rendered and entered its judgment affirming the judgment of the trial court. Petitioner immediately filed his motion for rehearing which was overruled by the Alabama Court of Appeals on March 15, 1942. Forthwith petitioner presented to the Supreme Court of Alabama a petition for writ of certiorari to review the judgment of the Alabama Court of Appeals. On April 9, 1942, the Supreme Court of Alabama rendered and entered its judgment denying writ of certiorari and affirming the judgment of the Alabama Court of Appeals, and filed therewith its written opinion stating reasons therefor. That opinion is Appendix A herein.

Petitioner duly filed with the clerk of this court a supplemental transcript of all of the aforesaid proceedings in the Alabama Court of Appeals and the Supreme Court of Alabama, duly certified by the respective clerks of said courts, which transcript has been printed, added to the record printed and now on file herein. Petitioner hereby incorporates and makes a part hereof such printed supplemental transcript of proceedings above referred to.

The record now presents a final judgment by the Supreme Court of Alabama. The judgment of that court affirms the judgment of the Alabama Court of Appeals, affirming the conviction of petitioner by the Lee Circuit Court.

WHEREFORE, petitioner prays

(1) that the writ of certiorari issued herein October 13, 1941, be deemed to include a command to the Clerk of the Supreme Court of Alabama to transmit the judgments of that court, its opinion of April 9, 1942, and the judgment of the Alabama Court of Appeals of March 9, 1942;

(2) that if the present writ of certiorari is not deemed to include the new proceedings and judgments then in such event a new writ of certiorari issue forthwith for such purpose;

(3) that this court's judgment, order and decision of March 9, 1942, dismissing the writ for want of final judgment be vacated and the cause be restored to the docket for rehearing and decision on the merits;

(4) that the original briefs heretofore filed, and the oral argument heretofore had herein (with the exception of so much of such briefs and argument as was concerned with the jurisdictional question) be deemed addressed to the cause as presented to this Court upon the supplemental transcript of proceedings in the courts below since March 6, 1942;

(5) that the judgment of the Lee Circuit Court, of the Alabama Court of Appeals March 9, 1942, affirming said conviction and of the Alabama Supreme Court of April 9, 1942, denying certiorari and affirming the judgments of the lower courts, each and all, be reversed with costs and the matter remitted to the court below there to be proceeded with consistent with the opinion of this court; and

(6) that your petitioner have such other and further relief in the premises as to the Court may seem just and proper.

Dated, Brooklyn, New York, April 25, 1942.

ROSCO JONES, *Petitioner*

by HAYDEN C. COVINGTON

Attorney for Petitioner

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay,

HAYDEN C. COVINGTON

Attorney for Petitioner

United States of America
State of New York
County of Kings

} ss:

Hayden C. Covington, being duly sworn, deposes and says: That he is a member of the Bar of this Court; that he is duly authorized to make this affidavit; that he has read the foregoing petition and is familiar with the contents thereof; that the same is true of his own knowledge except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

HAYDEN C. COVINGTON

Sworn to before me this 25th day of April, 1942.

W. K. Jackson, Notary Public
Kings County

[SEAL]

Appendix A**STATE OF ALABAMA • JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA**

October Term 1941-42

5 Div. 368

**Ex parte: Rosco Jones
(In re: Rosco Jones v. City of Opelika)****PETITION FOR CERTIORARI
to the Court of Appeals****OPINION**

[Filed April 9, 1942]

THOMAS, Justice:

Petitioner was found guilty of a violation of an ordinance of the City of Opelika requiring an annual license for transient agents or distributors of books or pamphlets for sale on the streets of said City. The Court of Appeals reversed the judgment. *Jones v. City of Opelika*, 3 So. 2d 74.

Upon petition for certiorari to this Court by the City of Opelika, a writ of certiorari was awarded and the judgment of the Court of Appeals was reversed and the cause remanded to that Court for further and final disposition. *Jones v. City of Opelika*, 3 So. 2d 76.

Thereafter, and on March 9th, 1942 the Court of Appeals affirmed the judgment of conviction upon the authority of the decision here rendered and on March 17th, 1942 denied application for rehearing.

The petition now before us presents the identical question considered and determined by this Court in *Jones v. City of Opelika*, 3 So. 2d 76. Petitioner has cited some additional authorities which have been considered, the two more nearly in point being *State v. Greaves*, 22 A. 2d 497

From the Supreme Court of Vermont and *City of Blue Island v. Anna Kozul*, Supreme Court of Illinois, MS. As we read these authorities they interpret *Grosjean v. American Press Co.*, 297 U. S. 233, as depriving all municipalities of the right to exact any license fee whatever, however reasonable the same may be, of anyone desiring to sell pamphlets or literature upon their streets, as violative of both the first and fourteenth amendments to the Federal Constitution. We do not so understand the *Grosjean* case. There the very form in which the tax was imposed was "in itself suspicious". The opinion further observes that it was "a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties".

In the instant case there is a plain, simple, reasonable license fee fixed for any agent or dealer who uses the streets for the sale of books or pamphlets, and the ordinance takes no account of the particular calling of such agent or dealer, whether minister or layman. We can see no reason against an ordinance of the character here involved and of consequence adhere to our views as expressed upon former consideration of this cause (3 So. 2d 76), to which we make reference for a more elaborate statement of the reasons which impel us to the conclusion here reached.

The writ will accordingly be here denied and the judgment affirmed.

Writ denied. Affirmed.

All justices concur except Knight, J., not sitting.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

Nos. 280, 314 and 966

280 ROSCO JONES, *Petitioner,*

v.

CITY OF OPELIKA, *Respondent*

ON WRIT OF CERTIORARI TO SUPREME COURT OF STATE OF ALABAMA

314 LOIS BOWDEN and ZADA SANDERS, *Petitioners;*

v.

CITY OF FORT SMITH, *Respondent*

ON WRIT OF CERTIORARI TO SUPREME COURT OF
STATE OF ARKANSAS

966 CHARLES JOBIN, *Appellant,*

v.

THE STATE OF ARIZONA, *Appellee*

APPEAL FROM SUPREME COURT OF STATE OF ARIZONA

Petitioners'

SUPPLEMENTAL BRIEF.

HAYDEN C. COVINGTON

Attorney for Petitioners

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*** Petitioners'**

SUPPLEMENTAL BRIEF

MAY IT PLEASE THE COURT:

This brief is *not filed in lieu* of briefs and motion for rehearing previously filed in these cases but is *in addition* to such.

With the exception of the conclusion reached and a few isolated statements in the majority opinion, it is manifest

* Moving parties herein are jointly referred to as PETITIONERS.

that the disagreement between us is not as to fundamentals and basic law of the Constitution but the difference has resulted from the application of the fundamental principles. This disagreement, we feel, can be and will be entirely obliterated to the end that unity of opinion will result through all returning to fundamentals, to reach a sound, equitable basis for decision in these cases.

To begin with, we all admit that in this nation the people of the United States are the sovereign power—not Congress, not the judiciary, not the executive, and not the several State governments or subdivisions thereof, but “We the people of the United States” are the sovereign power.

In writing the Constitution the sovereign people made the Constitution the supreme law of the land. This is admitted by all of us.

By the Constitution this government of delegated powers was created. By the same instrument, the Constitution, the inherent and fundamental rights of freedom of speech and of press and freedom to worship ALMIGHTY GOD were reserved for and by the people; and thereby originally Congress itself (the *national* legislative department) was estopped and restrained from burdening these rights in any way. By later amendment the same restriction was placed as against the States.

It has ever been the rule that the Federal government and its agencies have been impliedly protected by the Constitution from encroachments, directly or indirectly, upon the exercise of Federal powers of government. By a similar token the State governments have been impliedly protected from similar encroachments by the Federal government. These guarantees of freedom of action within proper fields have been secured by implied provisions in the Constitution. The sovereign *people* by the same compact have likewise set a more certain and express restraint

against both the State and Federal governments by the language used in the First and Fourteenth Amendments.

All will readily admit that a state tax or money exaction upon the exercise of rights by the government delegated to it is void. By stronger force of reason, on the same principle, it results that a tax imposed upon or a money exaction on account of rights expressly reserved to the sovereign people by the First and Fourteenth Amendments must fall.

In the case of the government the right is impliedly guaranteed by the Constitution. As to the sovereign people of the United States, the fundamental right is expressly secured against abridgment of all kinds.

The issues presented in these cases are favorably disposed of by this court in a unanimous opinion of a century ago. We refer to the case of *McCulloch v. Maryland*, 4 Wheat. 316, 431. We quoted from this opinion in petitioners' brief filed in the cases of *Murdock et al. v. Commonwealth*, Nos. 480-487 October Term 1942, pages 44 to 46, to which reference is here made. In addition to the quotation referred to, the court said:

"If we apply the principle for which the State of Maryland contends to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy in fact to the States. If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom

house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. *This was not intended by the American people.* They did not design to make their government dependent on the States." [Italics added]

Mr. Justice Nelson in *Collector v. Day*, 11 Wall. 113, 124, said:

"And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are necessarily, and for the sake of self-preservation, exempt from taxation by the States, why are not those of the [people secured by the Bill of Rights] States depending upon their reserved powers, for like reasons, equally exempt from [State] Federal taxation? Their unimpaired existence in the one case is as essential as in the other. It is admitted that there is no express provision in the Constitution that prohibits the general government from taxing the means and instrumentalities of the States, nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can only exist at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

The principle asked to be applied in the cases at bar also finds support in analogy to the cases arising under the "contract clause" where contracts have been protected from burdens in the form of taxation or money exaction. Mr.

Justice Bradley, in *California v. Central Pacific Ry. Co.*
127 U. S. 1, 41, said:

“How can it be possible that a franchise granted by Congress [right secured by First Amendment] can be subjected to taxation by State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said, ‘the power to tax involves the power to destroy.’ Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the Supreme Law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States [Bill of Rights] may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it; is not only derogatory to the dignity, but subversive of the [Bill of Rights] powers of the government, and repugnant to its paramount sovereignty. . . . The taxation of the [*exercise of rights secured by the First Amendment*] corporate franchise merely as such, unless pursuant to a stipulation in the [Constitution itself] original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. . . . It is not an idle objection, therefore, made by the company against the tax imposed in the present cases.” [Bracketed words added]

It cannot be argued that these cases are not in point, because they cannot be distinguished. In principle they are identical.

If a right secured impliedly to the Federal government by the Constitution cannot be taxed, by double force of

reason a right expressly guaranteed by the Constitution to the sovereign people cannot be taxed.

Regardless of whether *falsely* branded as "peddlers", "canvassers", "sellers", "hawkers" or any other odious, contemptible or uncomplimentary term, if one will stop to think, when disrobed of such popularly-conferred garments, petitioners will be found to be American citizens exercising the fundamental, inherent rights of freedom of press, of speech and of preaching the gospel of God's kingdom, which rights cannot be abridged by taxation or money exaction regardless of what color of glasses any member of the court uses in "viewing" activity of petitioners.

To sustain the taxes here is to destroy the cornerstone of democracy and free government of the people.

Let an ancient sound precedent be noted well: Long before men found it necessary to draw compacts to guarantee their rights the SUPREME LAW of ALMIGHTY GOD of heaven and earth, which in all ages secures the liberty of His covenant people and His ordained ministers, was by Artaxerxes, monarch of the Persian empire (about 500 B. C.), construed thus:

" . . . Also we certify you, that touching any of the priests and Levites, singers, porters, Nethinims, or ministers of this house of God, it shall not be lawful to impose toll, tribute, or custom, upon them. . . ."—See Ezra 7: 11-26, especially verse 24.

When rightly applied here, such rule, we submit, invalidates the license taxes in question.

Respectfully,

HAYDEN C. COVINGTON

117 Adams St., Brooklyn, N. Y.

Attorney for Petitioners and Appellant

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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APPEAL FROM SUPREME COURT OF STATE OF ARIZONA.

Petitioners'

MOTION FOR REHEARING

HAYDEN C. COVINGTON

Attorney for Petitioners

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APPEAL FROM SUPREME COURT OF STATE OF ARIZONA.

***Petitioners'**

MOTION FOR REHEARING

MAY IT PLEASE THE COURT:

Now come petitioners in the above causes and present
this their motion for rehearing, as provided by rules of

* For convenience appellant in No. 966, petitioners in No. 314, and
petitioner in No. 280 are herein collectively referred to as "petitioners".

this Court and pursuant to order enlarging time for filing same to and including the 5th day of September, 1942; and as grounds therefor show:

Grounds

1. This Court erred in refusing to reverse the judgments of the state courts because each of the challenged ordinances is *unconstitutional on its face and as construed and applied*, in that it denies petitioners' right of freedom to worship ALMIGHTY GOD, contrary to the First and Fourteenth Amendments to the United States Constitution.

2. This Court erred in affirming the judgments of the state courts because each of the challenged ordinances is *unconstitutional on its face and as construed and applied*, in that it denies petitioners' right of freedoms of press and speech, contrary to the First and Fourteenth Amendments to the United States Constitution.

ARGUMENT

Preliminary Remarks

Regardless of the sincerity of the members of this Court who joined in the majority opinion in this case on June 8, 1942, we emphatically and firmly question the correctness of that decision, and say: It is the most serious denial of liberty within history of the nation. Liberty is lost, usually, by people who do not know they are losing it. Liberty is destroyed by people who do not know they are destroying it. These liberties were bought dearly by centuries of struggle and expressed in the Bill of Rights, all of which are in grave jeopardy, if not entirely nullified by the majority opinion! How? In the modern "Stamp Tax", i.e., misapplied peddlers' license. We are greatly alarmed at this decision.¹

That opinion so beclouds prior decisions under the Bill of Rights and the Fourteenth Amendment by vague, fine-spun and hair-splitting discussion that it becomes impossible to ascertain definitely the line of demarcation between state powers and "fundamental personal rights" formerly held by this Court to be inalienable.

The minority opinions stand squarely on the Bill of Rights against the majority's approval of the suppression of liberties under the applied ordinances. We concur fully in everything said by each dissenting justice, and here by reference incorporate such as part of this motion for rehearing. Any extended discussion thereof would be merely 'gilding the lily'. Here, however, it is suggested that said dissenting opinions be considered with this motion.

¹ Madison said: "It is proper to take alarm at the first experiment upon our liberties. We hold this prudent jealousy to be the first duty of citizens and one of the noblest characteristics of the late revolution. The freemen of America did not wait until usurped power had strengthened itself by exercise and entangled precedents. They saw [avoided] all the consequences by denying the principle."

Direct Burden on Interstate Commerce Similar

The judgments in Nos. 280, 314 and 966 should be reversed on the authority of previous decisions of this Court involving identical ordinances knocked down as a burden on interstate commerce. The Court has overlooked entirely these compelling precedents which cannot be distinguished. We call upon the Court to face and decide the real question here.

The abstract principles stated by the "commerce clause" prohibiting state encroachment have been defined to include within its *prohibitive* terms, according to decisions not overruled by this Court to this date, the identical type of "license-tax" law. In such many cases this type of ordinance with substantially identical terms has been repeatedly held unconstitutional because it is an undue and direct burden upon interstate commerce. Chief Justice Stone's words are apropos here. See pages 8 and 9 of slip opinion, his dissent.

See such cases where this Court has expressly declared unconstitutional ordinances very similar to those here applied. Peddlers of interstate commerce articles are involved in those cases.²

The majority opinion says that there is no line drawn between tax on "gross receipts or a net income and a suitably calculated occupational license", when applied to worship of Jehovah. It is exceedingly difficult to understand this statement of the Court when *the Court* has recently said, as to the commerce clause, that there was a difference,³ and that a levy on gross income is void.

² See *McGoldrick v. Berwind-White Co.*, 300 U. S. 33, 55-57; *Sydney Robbins v. Shelby County Taring Dist.*, 120 U. S. 489, 494-496; *Caldwell v. North Carolina*, 187 U. S. 622, 624-632; *Rearick v. Pennsylvania*, 203 U. S. 507, 510-513; *Dozier v. Alabama*, 218 U. S. 124, 126-128, and *Real Silk Hosiery Mills v. City of Portland*, 268 U. S. 325, 335-336. See, also, *Carson v. Maryland*, 120 U. S. 502; *Asher v. Texas*, 128 U. S. 129; *Stoutenburgh v. Hennick*, 129 U. S. 141; *Brennan v. Titusville*, 153 U. S. 289; *Stockard v. Morgan*, 185 U. S. 27; *Crenshaw v. Arkansas*, 227 U. S. 439; *Rogers v. Arkansas*, 227 U. S. 401; *Stewart v. Michigan*, 232 U. S. 665; *Davis v. Virginia*, 236 U. S. 697.

³ *McGoldrick v. Berwind-White Coal Company*, 300 U. S. 33, 45 note 2.

In *Di Santo v. Pennsylvania*, 273 U. S. 34, 39, this Court said that such an ordinance is likely to be used "as an instrument of discrimination against interstate or foreign commerce".

This Court for the first time raised the point as to failure to attack the amount of the license tax. It is a fundamental rule of appellate procedure that the Supreme Court will not give consideration to issues not raised below and any new issues raised by counsel in the Supreme Court are frowned upon and such after-thoughts are rejected. (*Helvering v. Wood*, 309 U. S. 344, 348, 349; *Helvering v. Texpen Oil Company*, 300 U. S. 481, 498) It seems that this rule should likewise apply to afterthoughts of the Court, such as this new theory in constitutional law: *the amount of the tax must be attacked.*

This contention was not raised at any time in these cases until the majority spoke. Petitioners were not afforded an opportunity to face this question until June 8, 1942. It is herein answered by petitioners for the first time.

The opinion on this point opens wide the floodgates of speculation and nation-wide judicial confusion as to just when a license tax is unconstitutional. If the protection of civil liberty in the courts depends entirely upon determination as to what amount is or is not excessive, the protected rights become speculative, vague and enmeshed in a dragnet of confusion, and will vary with the rising of every sun and depend on the whim of every city council, police officer and magistrate vested with the arbitrary power to determine what is and what is not excessive. What would be excessive in one circumstance would not be in another.

This recently *manufactured* requirement so encumbers judicial process for establishing the "freedom" as to discourage, if not prohibit, the defense that the tax is unconstitutional. A court determination of inherent civil rights would be turned into an extended inquisition, by auditors

and referees, into the realm of finance, cause and effect, etc., and would vary in each case. It would require a burden on every minister attacking the license to call upon the charitable organization, oftentimes nation-wide, represented by him, to produce books of account thousands of miles away to show evidence of expense, etc. Thus defense is choked off by unreasonable expense in making proof in court.

In not one of the above commerce-clause cases did this Court consider or contend that 'the amount of the license tax must be questioned specifically before its constitutionality can be determined.' Nor did the Court deny rights there because the activity was viewed as commercial.

It was wholly unnecessary that petitioners attack the amount of the taxes. Each ordinance is unconstitutional as construed and applied, and it was unnecessary that petitioners secure tax license thereunder as condition precedent to raise its unconstitutionality. The courts below did not base their holding on any such technical rule of procedure.

Why the resort by this Court to such an irrelevant matter at this late date?

The cases cited in footnote 9 of the majority opinion do not support the proposition of necessity to so complain under the ordinances. They did not involve the "four freedoms" incapable of money valuation. Furthermore, here the ordinances are void on their face as construed; and under the rule announced in *Lovell v. Griffin*, 303 U. S. 444, 452-3, it is unnecessary to apply for a license in order to question constitutionality of the ordinance. A fortiori, one should not be required to question the amount of the tax, which tax, if imposed in any amount, is an unconstitutional burden on the privileges secured by the United States Constitution. *Magnano Co. v. Hamilton*, 292 U. S. 40, 45.

Distinction Without Difference

The majority's attempted distinction of the *Schneider* and *Lovell* cases is of no effect. It is distinction without a difference. The *Lovell* case ordinance required a license (permit) for which no fee or price was asked. Here the permit (license) is required, but before it can be obtained one must pay the tax. Here one must pay money and purchase his privileges secured by the Constitution. The Griffin type ordinance is admittedly unconstitutional. By greater force the ordinances here are void because they leave the right to distribute only to those wealthy enough to pay for the privilege of exercising constitutional rights. One unable to pay is denied the "privilege" of applying for the permit as well as his fundamental right to disseminate literature containing information and opinion. Thus constitutional rights become the prerogative of only the well-to-do and ultrarich, who alone can well afford more exclusive means of spreading ideas, i. e., the hiring of radio and public press as their avenue of communication. The *poor and weak* admittedly cannot reach such heights and are thus kept away from their constitutional rights.

Segregation

Witness, please, that in all the above cases involving the sort of ordinance here questioned this Court did not there do as here done: Segregate the money received from the other parts of the transaction! There the Court did not say that delivery of the article was protected while the money received was not. Here, however, the Court has done just that, without justification, even as the Connecticut Supreme Court of Errors wrongfully attempted to do in *Cantwell v. Connecticut*, 126 Conn. 1; 8 A. 2d 533, and which this Court held could not be done. (310 U. S. 296). We had never heard that a constitutionally protected transaction *itself indivisible* could be segregated by hairsplitting blows

of sophistry so that one element of the transaction would remain protected while another would be split away and not so protected. This new theory was for the first time announced by the majority of this Court.

If the evidence here had shown that the literature delivered was part of an interstate commerce transaction and the "commerce clause" had been relied upon, this court would have been compelled by former precedent to declare this type ordinance invalid; or else knock down such decisions of this court so as to sustain the present convictions. Why discriminate in favor of the "*commerce clause*" against the First Amendment?

"Religious Rites" Involved

In the majority opinion it is stated that the financial aspects incidental to exercise of freedom of worship through distribution of literature make constitutional the application of these ordinances. This Court goes further, saying, "If we were to assume, as is here argued, that the licensed activities involve religious rites, *a different question would be presented*. These are not taxes on free-will offerings. But it is because we view these sales as partaking more of commercial than religious or educational transactions that we find the ordinances, as here presented, valid. A tax on religion or a tax on interstate commerce may alike be forbidden by the Constitution."

In holding that petitioners' activity did not involve worship of Almighty God, i.e., a 'religious rite', a majority member imposed his *private* opinion as to what constitutes *worship*, and made findings not only unsupported by evidence but contrary to undisputed evidence, stipulation, and findings of the courts below.

In No. 280, the Alabama Supreme Court and Court of Appeals found that Jones was engaged in "religious rites" by distribution of pamphlets setting "forth the gospel of the Kingdom of God as he believes and preaches it".

(R. 3-4, 62) In the trial court respondent admitted that Jones' activity was that of 'a minister of the gospel and engaged in such work' at the time of his arrest. R. 54.

In No. 314, it was stipulated that petitioners were ordained ministers believing 'that the only effective way to preach is to go from house to house and distribute books and pamphlets'. (R. 14) That neither they nor their charitable corporations, publishers for Jehovah's witnesses, make any profit. (R. 12) That 'the books were distributed free when people wishing them were unable to contribute'. (R. 13) The record shows that the activity was admittedly 'religious rites'. (R. 15-20) The stipulation admits that the literature is not sold, nor profit made: "The small amount of money contributed by the public for the literature covers only a portion of the actual cost of this work, the deficit is made up by voluntary contributions from those who share in this work." (R. 20-24) The Arkansas Supreme Court finds the facts pursuant to said stipulation and *did not* find a sale, but that they solicited a contribution and if the person was unable to contribute he could obtain the literature without charge. R. 30-32.

In No. 966, the Arizona Supreme Court stated that Jobin was 'a regularly ordained minister of Jehovah's witnesses—going from house to house in the city of Casa Grande preaching the gospel, by means of spoken word, by playing various religious records with approval of the householder, and by distributing literature which set forth his understanding of the Bible.' (R. 47-48) Also, "if the parties did not desire to buy the books but promised to read them carefully, they were given free of charge." R. 48.

On the record, this Court cannot avoid finding the activity involved 'religious rites', and cannot assume any different position. The taxes in question *are* taxes on free-will offerings.

The construction of the ordinances in question by the state courts presents the same questions as though the

municipalities had passed a law providing that 'all persons receiving money toward preaching while so engaging in acts of worship of Almighty God or in religion must procure a license from the city clerk and pay therefor the annual fee' of a stated sum. No person would suggest that such a law is *not* invalid. Even the majority admits such a law would be invalid. Yet the Court here sustains laws, as construed and applied, which do that very prohibited evil thing.

The Court cannot properly say there is no "religious" question involved simply because the majority opinion judges lacked judicial breadth of vision to discern it. Many judicial decisions have upheld petitioners' activity as 'a religious rite'. This Court expressly so held in the *Cantwell* case. Why the change of opinion now?

The moment any court, be it the Supreme Court or the lowly magistrate's court, assumes the right to hold a particular "religious" view unreasonable, that moment it begins to deny "religious" *freedom*, which it is sworn to protect. The very purpose of the Bill of Rights is that unpopular minorities may hold and express views unreasonable to majorities, judges not excepted.

On this point the Kansas Supreme Court in a case concerning Jehovah's witnesses, *State v. Smith*, 127 P. 2d 518, decided July 11, 1942, said: "We are not impressed with the suggestion that the religious beliefs of appellants and their children are unreasonable. Perhaps the tenets of many religious sects or denominations would be called reasonable or unreasonable, depending upon who is speaking. It is enough to know that in fact their beliefs are sincerely religious, and that is conceded by appellee. Their beliefs are formed from the study of the Bible and are not of a kind which prevent them from being good, industrious, home-loving, law-abiding citizens. Upon this point the evidence is clear." In that case the Kansas court refused to follow the decision of this Court in the *Gobitis* case and defiantly

held that the Kansas Bill of Rights was stronger than the First and Fourteenth Amendments to the United States Constitution as construed by this Court.

The attempted distinction by the majority between activity of Jehovah's witnesses and "recognized" religious clergy, so as to protect the latter and "regulate" the former, cannot be sustained except in *private* opinion of the judges disregarding the right of the individual to make his choice of worship or to act as dictated by God's law. Why protect the rights of the clergy recognized by the majority and not equally protect Jehovah's witnesses to whose *way* of preaching, or to whose *message* preached, the majority takes exception?

Not Commercial Transactions

In the record of these cases there is no support for the conclusion that the activity was commercial.

By what process the majority reached the conclusion that petitioners' activity is *commercial* is not revealed. Strange that this Court should reach such a conclusion in the face of respectable findings of many other federal and state courts, not so high as this Court but equally familiar with the facts, positively stating that petitioners' work is not commercial.³

The contrary is established by evidence and stipulation, that the work was charitable and benevolent. The majority judges have erroneously substituted their *private* opinions for the stipulation and evidence.

Petitioners' activity is not at all like Protestant churches maintaining a bazaar and selling food, clothing and other merchandise to earn money. Such church practice is wholly

³ *State v. Meredith*, 197 S. C. 351, 15 S. E. 2d 678; *Semansky v. Stark*, 196 La. 307, 199 S. 129; *Thomas v. Atlanta*, 59 Ga. App. 520, 1 S. E. 2d 598; *State v. Mead*, 230 Iowa 1217, 300 N. W. 523; *State v. Richardson*, . . . N. H. . . . (decided June 24, 1942); *Shreveport v. Teague*, 8 S. 2d 640, . . . La. . . . (decided May 25, 1942); *Cincinnati v. Mosier*, 61 Ohio App. 81, 22 N. E. 2d 418; *Donley v. Colorado Springs*, 40 F. Supp. 15.

unrelated to public worship or preaching in a pulpit.

The Court has confused activity of Jehovah's witnesses with, and impliedly compared it to, practices foreign to and no part of "religious rites", such as church "suppers" and "binge parties" conducted by "recognized" religionists *to earn money*. Such practices cannot be confused with "religious rites".

No one seriously contends that taking of *money* in the contribution plate passed throughout the audience before the sermon from the pulpit makes such practice of recognized religionists "commercial", or 'partaking more of commercial than religious transactions'. This Court so states, that *such* free-will offerings are not taxable as commercial activity. Thus the clergyman could not be required to pay a license fee before entering the pulpit simply because he, orally and by passing the plate, solicits contributions of money to sustain him. Thus the only difference between methods of the recognized religious clergy and the way Jehovah's witnesses work is that clergymen solicit contributions in edifices and then sermonize, while Jehovah's witnesses preach as did Jesus and His apostles, publicly and from house to house (Luke 13: 26; Acts 20: 20; 1 Peter 2: 9, 21), receiving 'free-will offerings' as they go to people not in attendance at church edifices and who either are or are not members of any "religion". (Luke 8: 1, 3) But as to Jehovah's witnesses, the Court takes a different position. The Court's noble-sounding expression will not be accepted by the tax collector in lieu of the fee required by any city ordinance applied to Jehovah's witnesses.

The Court says that a tax on the "religious rite" is unconstitutional. Petitioners' distribution of their literature is

⁴ "It may well be that the wisdom of American communities will persuade them to permit the poor and weak to draw support from the petty sales of religious books without contributing anything for the privilege of using the streets and conveniences of the municipality. Such an exemption, however, would be a voluntary, not a constitutionally enforced, contribution." REED, J., majority opinion.

admittedly a 'religious rite', i. e., their *way* of preaching the gospel. Their taking of contributions, while incidental, is a necessary part of the entire 'religious rite' and is protected as is the transaction of the *recognized* clergy in their solicitation of money from the pulpit or from house to house. To permit licensing of a preacher, as a condition precedent to his receiving contributions to sustain him to preach further is identical with license taxation of preaching itself. It would choke off the sustenance thereof. The hairsplitting dissection of the protected right performed by the majority opinion to sustain the license tax finds no support in law, reason or fact.

Any attempt by the majority judges to distinguish between the *protected* activity of the recognized clergy and the "unprotected" activity of Jehovah's witnesses (who follow the example of Christ Jesus and His apostles) is a distinction unsupported by law or fact. If such misapplication of the ordinances is sustained, it might well be that the *protected* religious clergy will hang on the gallows designed for Jehovah's witnesses. Well did the Supreme Court of Louisiana, in *Shreveport v. Amos Teague* (one of Jehovah's witnesses), 8 S. 2d 640, on May 25, 1942, so say.

Not every activity involving a 'monetary incident' is merchandising. Dissemination of ideas is expensive, if appreciative hearing is secured. No missionary effort, whether religious or political, can be run without money. It is proper and necessary to receive contributions to help defray the cost of dissemination. To *confuse* the commercial business of selling fruit, vegetables, etc., with activity carried on by petitioners *in the public interest* disregards major emphases which distinguish charitable activity from Woolworth's, the political party from "Wall Street".

What Jehovah's witnesses do is the very antithesis of commercialism, hawking and peddling. The transactions were not for profit or livelihood either to petitioners or to the benevolent publishing corporation. The commodity (lit-

erature) was not commercial; the way of working was not commercial, and the purpose was not commerce. No business could survive on such basis as conducted by Jehovah's witnesses. In short, their activity was neither "sales" nor business. It was essentially the distribution of literature containing written "sermons"—but *on the terms of the receiver*, who, so desiring, could acquire the literature without contribution; however, any free-will offering was accepted, to aid toward cost of publishing more.

When there is no element of gainful enterprise and the literature is tendered on above-described terms, all semblances of "sale" and commercial elements vanish. When recipient tenders money under such conditions, he donates it to the cause just as the people do who drop coins in Salvation Army tambourines. That is true regardless of whether or not they take the tendered copy of "War Cry". To deem the parties to such a transaction as bargaining at arm's length, cautiously applying *caveat emptor* in the manner of housewives dealing with hucksters, strains credulity, judgment and common experience.

The majority opinion further states that when charitable groups sell books and tracts as a source of funds, a reasonable fee for their money-making activities may be required and "It is enough that money is earned by the sale of articles". When applying that rule to Jehovah's witnesses, who substitute printed books for oral sermons, it can be similarly applied to the clergyman in the pulpit who takes up collection. Oral sermons are costly; so also are printed ones and likewise their delivery. Hence free-will offerings are even more vital in the latter case.

The Court will take judicial notice of the fact that recognized clergymen from their pulpits solicit "free-will offerings" by methods indistinguishable from the "transactions" which the Court views as "commercial" when conducted by Jehovah's witnesses. Why this discrimination?

In the edifice, the clergyman announces the church

treasury's need. Not infrequently he appeals vigorously for a specified sum, whereupon the ushers pass the plates. Often he calls upon each parishioner to pledge a stated sum for each week's offering. Witness also the arrangement of pew rent, allowing seats only on advance *cash* payment. Other clergymen have a fixed "entrance" fee, not unlike the well-known "cover charge" of the swank *temple du gourmet*! Please note such "free-will offerings" are required to be made prior to enjoying 'benefit of clergy'—the oral sermon.

Jehovah's witnesses, however, give literature not upon condition of either advance payment or any payment, but permit the desirous recipient to contribute any sum he chooses, if able; and if unable to contribute, literature is left *gratis* upon his promise to read it.

It is manifest that such "transactions" by recognized religious clergy may be rightly viewed as partaking more closely of 'commercial transactions' than the preaching by Jehovah's witnesses.

The act of taking the contribution cannot be segregated from the act of worship, so as to enable taxation, without burdening the act of worship.

It is entirely proper to receive contributions to aid in preaching the gospel. (See 1 Corinthians 9:3-27.) This reasoning of Paul is corroborative of the Master's own words: "The workman is worthy of his meat [maintenance]." (Matthew 10:10) That Jesus accepted contributions in course of His preaching from house to house and city to city (Luke 8:1, 3) is proved in that one of His disciples carried the contribution bag with funds for necessities and, occasionally, as the record shows, the disciples drew on that bag for their sustenance, as they worked *in the public interest*.—John 13:29; 12:6; 4:7, 8; Luke 9:52, 53; Mark 6:37; 14:12-16.

The Scriptures show that Jesus Christ's apostles did not ask for nor obtain a license or pay a tax as a condition precedent to preaching because they received contributions.

Application of a license-fee ordinance to the act of taking contributions of itself burdens and suppresses the act of worship connected therewith, (*Cantwell v. Connecticut*, supra) Asking for permission or license to perform acts of worship commanded by Jehovah and His Son Christ Jesus to be done by His servants is unnecessary and is exalting the State above God.

Judicial Discrimination

The position taken by the courts below and in the majority opinion clearly discriminates in favor of "recognized" clergy as against "the poor and weak" servants of Jehovah God, preaching as did Jesus.

This discrimination cannot be screened for long behind statements to the effect that the activity of Jehovah's witnesses is viewed as "commercial", when contributions to the recognized clergymen, who regularly *solicit* contributions, is not so labeled and taxed.

"The mind rebels at the thought that a minister of any of the old established churches could be made to pay fees to the community before entering the pulpit." MURPHY, J., dissenting opinion.

The fair judicial mind also rebels against taxation to prohibit and substantially impair the spread of the message of the Kingdom of Almighty God by Jehovah's witnesses, even though elements of their preaching are controversial and run counter to traditional notions of some persons in any community.

While Jehovah's witnesses are unpopular, this is not because of any wrongful course, but is solely because they act strictly in obedience to Almighty God and Christ Jesus. "Ye shall be hated of all nations for my name's sake."—Matthew 24:9.

In spite of nation-wide unpopularity caused by misrepresentation and by pressure groups, they are, nevertheless, entitled to the same protection under American law as

clergy, religionists get. As American citizens Jehovah's witnesses have the same rights.

Justice Jackson

in *Edwards v. California*, 314 U.S. 160, 182-186, among other things said: "The power of citizenship as a shield against oppression was widely known from the example of Paul's Roman citizenship which sent the centurion scurrying to his higher-ups with the message: 'Take heed what thou doest; for this man is a Roman.' I suppose none of us doubts that the hope of imparting to American citizenship some of this vitality was the purpose of . . . the Fourteenth Amendment." See, also, Acts 22:23-30; Acts 25:10, 11, where Paul claims his right as a Roman citizen and stated, "I appeal unto Cæsar."

Prohibitive Burden on Worship and Press

The majority says: "So the mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows." This is a new theory grafted onto the Constitution and the law. According to precedent; the only time acts involving freedom of conscience are subject to restriction is when the act presents a clear and present danger to the nation and to property rights of others; or is contrary to morals, or that public peace will be invaded. The Court does not define "competing needs", but the point seems well answered in *Schneider v. State*, 308 U.S. 147.⁵

"The mind and spirit of man remain forever free," says the Court. But he still needs a license! His mind and spirit are free so long as he sits on a porch, or is sound asleep in bed. If his mind and spirit move him to get up and go some-

⁵ "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." ROBERTS, J.

where *in the interest of others*, there freedom ends and he must have a license. Under this doctrine only the unused mind is free; only the spirit which never soars has the right to fly. The Court has ruled firmly that if you don't use your mind, none may interfere with you. If you do, they may. Jehovah God and Christ Jesus dissent: "No man, when he hath lighted a candle, putteth it in a secret place, neither under a bushel, but on a candlestick, that they which come in may see the light." (Luke 11:33) See, also, Matthew 10:27; Mark 4:21, 22. *Freedom of thought only* is a favorite Nazi tenet of liberty without freedom of expression.

The fee for use of the public streets for business purposes is proper for use beyond the common right. It is a sort of rental or reimbursement for wear and tear from private use. But it has no valid bearing on the common right or use, more especially free speech, a free press, and worship of Almighty God. (John 4:21-23; Proverbs 1:20, 21) That these are part of street heritages means they cannot be impaired, notwithstanding their exercise may be regulated appropriately.

Taxation is not appropriate for such regulation. Once that wedge enters, it widens with every legislative stroke. Under guise of securing public order, decorum and free movement of traffic public expression is suppressed. *Taxed speech is not free speech.* It is silence for persons unable to pay the tax. Nor is taxed distribution of literature a free press. (*Grosjean v. American Press Co.*, 297 U. S. 233) Nor is taxed dissemination of Bible literature freedom of worship.

This Court has no more right to hold the activity of Jehovah's witnesses *commercial* than it would to find that the so-called "minute men" knocking on the doors of every house in the nation to sell war bonds are subject to a license tax. If this decision is upheld there is nothing to prevent local authorities from so applying it. The approval of this license tax is the same as approval of a fixed unconsti-

tutional tax of two cents per copy on each pamphlet, newspaper or leaflet distributed in the city, and it is not necessary to attack the amount of such so-called PER-COPY tax as a condition precedent to questioning the constitutionality.

The license charge made here by the ordinances infringes distribution. It will bear most heavily on persons least able to afford it and most in need of avenues for free communication, as petitioners, who are *prevented by boycott* and pressure methods of "big" religionists from hiring use of newspaper space and radio time.

"Substantial Clog"

The majority says that if the literature had been given away free then the ordinances would be unconstitutional if applied. In this they unjustly limit the freedom to those able to distribute gratuitously.

Freedom of speech and press is not confined to distribution without charge. There may be others with messages more vital but purses less full, who must seek some reimbursement for their outlay or else forego passing on their ideas. The pamphlets of Paine were not distributed gratuitously. (MURPHY, J.) This Court decrees, in effect, that THE PRESS now remains the agent only for those who can afford to *purchase* the right of publication.

It is admitted that if the ordinances required only procurement of a license permit without a tax such would be unconstitutional and void. (*Schneider v. State* and *Lovell v. Griffin*, supra) By double force the adding of a tax to the invalid license would not save it, but increases its objectionable features.—*Magnano Co. v. Hamilton*, supra.

If petitioners have the right to engage in this activity by giving the literature free the right cannot be properly taken away by reason of their accepting small sums contributed by willing givers to publish more books, regardless of how such contributions may be viewed by others.

The line between free distribution of literature on the

streets and from house to house, upheld by this Court, and what was done here by these petitioners, is too thin to sustain a distinction in constitutional right. *"With or without the money feature, petitioners were pamphleteering, not selling or begging."* Mr. Justice Murphy says: "If this Court is to err in evaluating claims that freedom of speech, freedom of the press, and freedom of religion have been invaded, far better that it err in being overprotective of these precious rights."

Borderline cases such as described in the majority opinion should be resolved not in favor of the regulation, but in favor of the cherished right.

Throttled Press

Suppose unscrupulous bosses of the various American cities received word that the press was about to expose graft and mismanagement in city affairs. Such bosses or their political stooges could speedily require the distributors of newspapers to pay a peddlers' license or be prosecuted, thus curtailing or stopping distribution. This application of such ordinance encourages the press to suppress vital news or print it and be driven out of business by wrongful extortion of the license for its newsboys or through payment of fines for refusal to secure such license. This license by the majority opinion for such condition hampers freedom of conscience. It chokes free discussion and circulation of opinion. It hedges in and impedes the march of theories and doctrines before the eye of public criticism—without which progress and enlightenment are impossible. This presages the passing of free expression and discussion—essential light of liberty—and paves the way to put the people under a cloud of ignorance like the pall that hangs over those now ruled by Axis despots.

This decision has unraveled constitutional history by imposing a tax as oppressive as the Stamp Tax. By attaching strings to the freedoms they are quickly pulled back-

ward into the DARK of the Middle Ages. The Court has permitted local town licensing officials throughout the land to set up a catalogued price list on the freedoms formerly held to be "incapable of money valuation". As Sam Grafton, columnist, says concerning the Court's decision: "Ten dollars gives you free speech, and \$9.99 says you can't open your face."

Historically freedom of the press means freedom from burdensome taxation in any form, large or small. Taxation of the press is equally as objectionable as censorship.

Very soon after introduction of the printing press into England by William Caxton, in 1476, the Crown assumed complete control of the press. Henry VIII did so by authority of his kingly prerogative and the issuance of Letters Patent granting a monopoly of the privilege of printing and distributing and selling books. Under Mary, control of printing was maintained by limiting such right to the Stationers' Company which was founded by royal charter in 1557. The number of presses was limited, all publications were subject to previous inspection, and the seat of regulation was in the Court of the Star Chamber, which had been granted the power of general censorship. Both the Tudors and the Stuarts resorted to *this court* for the suppression of seditious libels.

Under Elizabeth, the number of printers was limited to twenty, no one could print except under royal patent, and no book could be printed except in London, Oxford or Cambridge. During the reign of Elizabeth, prosecutions for seditious libel continued, and in 1586 the Star Chamber published stringent ordinances for the regulation of the press, again restricting the presses to London, Oxford and Cambridge. Under these ordinances no one was permitted to print anything until it had been "seen and allowed" by the archbishop of Canterbury or the bishop of London,—except the queen's printer or the law printers, who were licensed by the chief justice and the chief baron. The Stationers' Com-

pany was authorized to search houses and shops, to destroy all books printed in violation of the ordinance, and also to destroy all unlicensed presses.

• The early Stuarts, James I and Charles I, claimed all the royal prerogatives of their predecessors. Prior to 1637, the number of unlicensed printers had become so great that the Star Chamber decreed that all printed books must be submitted for license and must be registered by the Stationers' Company before publication, under penalty of forfeiture of the presses. Law books continued to be licensed by the chief justice or the chief baron of the Exchequer, books of history and politics by the secretaries of State, books of heraldry by the earl marshal, and all others by the archbishop of Canterbury and the bishop of London. Only twenty master printers were permitted, and no one could have more than three presses. Prosecutions for sedition and seditious libel continued to be brought in the Court of Star Chamber. One of the most notorious was the prosecution of Prynne, who published a work attacking the theater, hunting, public festivals, etc. He was sentenced to stand twice in the pillory, to lose both ears, to pay a fine of five thousand pounds, and to be imprisoned for life.

Although the Court of the Star Chamber was abolished by Act of Parliament in 1641 and restrictions upon freedom of the press disappeared temporarily, the Long Parliament, in June, 1643, re-established regulation and licensing of printing; it declared that no order of either house of Parliament should be printed except by their express consent and that no book or pamphlet whatsoever should be printed unless it had been first licensed and entered in the register of the Stationers' Company. The latter was again authorized to search for unlicensed presses and books and to destroy them, to arrest authors and printers and to inflict punishment upon them. It was the passage of this licensing act of 1643 that inspired John Milton to write his "Areopagitica", which was itself written and published in

violation of the license statute. The Licensing Act was repealed in 1649 and for a short time even the licensed press was suppressed by Parliament, but the statute was re-enacted in 1650. In 1655 Cromwell suppressed all publications except two official publications conducted by Nedham, who continued to control the press until his death. In 1659, General Monk, after Cromwell's death, encouraged Henry Muddiman to begin the publication of a paper called "Parliamentary Intelligencia", and in 1660 the Council of State suppressed the two papers conducted by Nedham. The Licensing Act was re-enacted in 1662 and was in substance the same as the Star Chamber order of 1637. All books or pamphlets had to be entered with the Stationers' Company; the master printers were still limited to twenty, and books could be printed only in London, York or at the universities. The Act was in effect for two years and was renewed from time to time until 1679. It was again renewed in 1685 and remained in effect until 1695. Although during this period there were numerous prosecutions for seditious libel, the publication of papers, tracts, leaflets, etc., increased enormously.

Under James II, a large number of printers, in spite of the Licensing Act, carried on their art in the garrets and other secret places of London. During his reign, the Licensing Act was renewed and was enforced in a particularly tyrannical manner except against the Jacobite Press, which was permitted to publish articles favorable to the King.

Under William and Mary, the Licensing Act was again renewed. When the last renewal expired, in 1695, the Committee of the House, which had the Act under consideration, recommended a further renewal, but when submitted to a vote the report of the committee was defeated. This date marks the end of licensing and censorship in England.

About this time daily newspapers appeared and criticism of the House of Commons became so violent that, at the suggestion of Queen Anne, in 1712, the House resorted to

a new method of restricting freedom of the press. It enacted a stamp tax on newspapers and a tax on advertising. For nearly a century and a half thereafter there was constant oppression by levy and collection of these taxes. These taxes were one of the chief causes for unrest among the American Colonists and were commonly called "Taxes on Knowledge". Their purpose was to curtail the circulation of cheap newspapers among the masses of the people, and in this they were actually successful to a certain extent although papers on which the tax had not been paid continued to be printed in violation of the law. From time to time the amount of the stamp tax was increased in order further to restrict the circulation of cheap newspapers. Progressive increases were enacted in 1756, 1789, 1798, 1804 and 1814. In 1836, the tax was reduced for the first time, but a heavy duty was levied on the paper material itself. The direct result of these taxes was to make the printing of newspapers costly and to restrict their circulation. The advertisement tax was reduced in 1833, and abolished in 1853. The stamp tax was finally abolished in England in 1855, and the duty on paper was repealed in 1861.

Prior to the adoption of the Constitution of the United States, not only did the British Parliament impose stamp taxes on newspapers in the colonies but some of the colonies themselves established such taxes. Massachusetts imposed a stamp tax on newspapers during the years from 1755 to 1757, and New York imposed such a tax from 1757 to 1760. In 1765 the British Parliament imposed a tax on all colonial newspapers of from a half penny to a penny, according to the size of the newspaper, and a tax of two shillings on every advertisement. This tax raised a storm of protest in the colonies, who cried out against these taxes as "taxation without representation".

In 1785 the Massachusetts legislature imposed a stamp tax on all newspapers and magazines, and the following year an advertisement tax was imposed. Both taxes met with

violent opposition, and the former was repealed in 1786, and the latter in 1788. A stamp tax was the current method of suppression at the time of the revolution and of the adoption of the *Constitution*, and unquestionably the Bill of Rights and the Fourteenth Amendment were both aimed and leveled at this evil as well as the older methods of censorship. The license tax here imposed upon the distributor destroys the life of the press—distribution. It also falls squarely within abridgments discontenanced by the Fourteenth Amendment.

A pamphlet entitled "Taxes on Knowledge", by Baron Brougham and Vaux, published in 1834, contains a very interesting discussion of stamps on newspapers and periodicals. He points out that the effect of such a tax is to increase the number of illegal newspapers, particularly those of a malignant and profligate character. It is his opinion that cheap newspapers are for the public benefit and that insofar as such a tax increases the cost of newspapers, it is not in the public interest. He points out that in America, where no stamp tax existed at that time (1834), the proportion of newspapers to the population was twenty or thirty to one more than in England!

The word "abridging" in the First Amendment needs discussion. The word "abridge" means to shorten, to curtail or to reduce, and comes from the same root as the word "abbreviate". The word does not mean to destroy, forbid, prohibit or prevent. The use of the word "abridge" in the First Amendment may be compared to the word "burden". In order to show the ordinances invalid, it is not necessary to find that they deny, destroy or prohibit freedom of the press; but it is sufficient if it is found that the ordinances

See also *Near v. Minnesota*, 283 U.S. 697, 707-716; *Grbsjean v. American Press Co.*, 297 U.S. 233, 244-251; "The History of American Journalism," by W. G. Bleyer, 1927 ed. 1-129; "Free Speech and a Free Press," by G. J. Patterson, 1930 ed.; "The Struggle for the Freedom of the Press from Caxton to Cromwell," by W. M. Clyde, 1934 ed.; and "History of Taxes on Knowledge," by C. D. Collet, 1890 ed.

burden this right. Admittedly they do, and therefore are unconstitutional.

Just how this Court can avoid the impact of the holding in *Grosjean v. American Press Co.*, 297 U. S. 233, is not clear. Like all other authorities relied upon by petitioners, a discussion of same is completely ignored in spite of the fact that it is directly in point. There Louisiana imposed a two percent tax on the gross receipts of any newspaper, magazine, etc., engaged in selling advertisement in the state and having a circulation of more than 20,000 per week. Contrary to the statement made from the bench by two majority justices during the oral argument of the case at bar, it is to be noticed that this Court decided that the tax was a direct burden on freedom of the press and *was not* decided on grounds of unfair discrimination. Although this Court could have avoided a decision of the freedom-of-press question in the *Grosjean* case by sustaining the contention of unfair discrimination, it did not do so. The two percent *gross income* tax declared invalid cannot be distinguished from the license tax imposed here on the distributor. The tax in the *Grosjean* case was on the *COMMERCIAL income*, while here the tax is on the distributor, irrespective of "income". A fair discussion of the *Grosjean* case is necessary before a disposition can be made of this case.

Appendix

The majority decision in these cases has aroused the *national press* to make unusual and condemning comments as to consequences. Of the huge number of editorials examined not one has been favorable to the majority opinion. Excerpts from some of these editorial comments are printed in a separate document, designated as Appendix. That is filed with the Clerk and available to members of the Court who are interested in the *laymen's* views of this Court's action here.

Real Issue Avoided

The Chief Justice, in the present cases at bar, says: ". . . In their briefs here they argue, as upon the records they [petitioners] are entitled to do, that the taxes are an unconstitutional burden on the right of free speech and free religion comparable to license which this Court has often held to be an inadmissible burden on interstate commerce. . . . While these are questions which *have been studiously left unanswered* by the opinion of the Court, it seems inescapable that *an answer must be given* before the convictions can be sustained. Decision of them cannot rightly be avoided now by asserting that the amount of the tax has not been put in issue; that the tax is 'uncontested in amount' by the defendants, and can therefore be assumed by us to be 'presumably appropriate', 'reasonable,' or 'suitably calculated'; that it has not been proved that the burden of the tax is a substantial clog on the activities of the defendants, or that those who have defrayed the expense of their religious activities will not willingly defray the license taxes also."

Before the judgments of conviction can be affirmed it is necessary to answer the avoided questions, as suggested by Chief Justice Stone. To avoid answering such questions impliedly overrules or sidesteps compelling precedent and destroys the value of opinions, undermines public confidence. It makes uncertain and greatly confuses the law. It is contemptuous of "abstract principles" and former well-reasoned decisions. To decide, as here, in accordance with what seems to the justices to be "right" and "just" in the particular instance, is one of the easiest ways for judges to convert themselves into lawmakers and legislators. It is one of the easiest ways to convert the Court into the super-government.

"There is a way which *seemeth right* unto a man, but the end thereof are the ways of death."—Proverbs 14: 12.

"If it be the part of wisdom to avoid unnecessary decision of constitutional questions, it would seem to be equally so to avoid the unnecessary creation of novel constitutional doctrine, inadequately supported by the record, in order to attain an end [not] easily and [not] certainly reached by following the beaten paths of constitutional decision." STONE, J., in *Hague v. C. I. O.*, 307 U. S. 496, 525. [Bracketed words supplied.]

Not Regulatory

The lengthy argument by the majority opinion devoted to power to regulate is entirely immaterial to the validity of the ordinances in question.

The ordinances are admittedly not regulatory and do not purport to control time, place or manner of distribution of pamphlets or even "sale" of merchandise. One obtaining the license is by the ordinances left free to "peddle" anywhere at any time. No abuses justifying regulation are advanced here. The tax is not contended to be a "fee" for policing or licensing expense but is solely tax. The courts below described them as taxes, not fees. In *Cox v. New Hampshire*, 312 U. S. 569, 577, the "fee" was not a revenue tax, but one to meet the expense incident to administration and to provide police protection and attendance to parades. The taxes here involved are ostensibly for revenue purposes. It is not claimed that activity of Jehovah's witnesses creates problems causing expense to the municipality.

Bad Effects Prove Error

Justness of a decision by the Court is determined primarily by its consistency with the perfect law of Almighty God. (Psalm 19:7) This is absolutely true as to dealings with servants of Almighty God, such as Jehovah's witnesses. The decision in *Minersville School District v. Gobitis*, 310 U. S. 586, this Court's *stepping stone* or *stumbling stone*

in this case, is clearly wrong because it is manifestly contrary to Almighty God's commandment respecting conduct of creatures bound in a covenant with Him. (Exodus 20:2-7) Experience from misapplication of the *Gobitis* decision also shows that it is wrong.

Immediately following delivery of the *Gobitis* opinion on June 3, 1940, a nation-wide campaign of newspaper publicity and idle gossip was launched by enemies of Jehovah's witnesses, *falsely* accusing them of being 'against the flag and government', solely because they refuse to salute any flag, including the American flag, for *conscience*' sake. The decision was like a lighted match applied to a field of dried grass. Prejudice created by unfavorable newspaper publicity flamed into open violence. Widespread mob attacks resulted immediately against Jehovah's witnesses. For more than two years, in thousands of communities throughout the land, certain religious elements or "would-be" patriotic elements have led men controlled neither by law nor by reason to assault thousands of Jehovah's witnesses, men, women and children; destroyed their property; drove them from their homes; burned their houses, furniture, books and money; tied groups of them together and forced castor oil in large quantity down their throats; herded them like beasts through the land; and committed numerous other deeds of violence and wickedness against them, and continue so to do to this day without interference from *the law*. Public officials, influenced by well-known religionists, broke into homes of private citizens, kidnaped and carried them from one state to another, and broke up their private Bible-study meetings.

Thousands of children have been expelled from school and great numbers prosecuted as delinquents, many convicted and taken from parents. Hundreds of parents have been threatened with prosecution for the alleged crime of contributing to delinquency and truancy of their children,

and many convicted—all because they have taught them the Bible and the children have obeyed God's commands.

Thus it is manifest that the *Gobitis* decision against freedom of conscience has ever been and now is an instrument for evil in the hands of superpatriots and pseudo-patriots.

Today hundreds of Jehovah's witnesses are being prosecuted under state law recently enacted in Mississippi which prohibits possession and distribution of literature explaining the reasons why Jehovah's witnesses cannot salute the flag. The punishment is confinement in the penitentiary and is mandatory for the duration of the war, not to exceed ten years. The state of Louisiana has followed suit by enacting same statute. This is another direct result of the *Gobitis* decision.

We venture that the decision in the present cases will result in even greater persecution than from the *Gobitis* case. Almost every town, village, and hamlet throughout the United States has a license-tax ordinance of the kind here involved, which the Court now advises can be properly applied to Jehovah's witnesses. In these United States there are many thousands of active ministers, Jehovah's witnesses, distributing literature from house to house and upon the streets, all of whom will be subject to prosecution thereunder. Already, since June 8, 1942, hundreds have been arrested and prosecuted. Since they cannot apply for a license to do that which Jehovah God commands, it is reasonable to expect that thousands more will be prosecuted, convicted and jailed. This condition is comparable only to that which has prevailed in Germany for a decade, where Jehovah's witnesses are beheaded, shot, and linger in concentration camps by the thousands because they refuse to 'Heil Hitler', salute the Nazi flag and violate the commandment of Almighty God to continue preaching the gospel of God's Kingdom. They have been similarly treated in every country overrun by the Axis powers.

“Martyrdom”

The majority opinion quotes from Cardozo, J., in *Hamilton v. Regents*, 293 U. S. 245, 268, a case which is not at all in point here, saying, “One who is a martyr to a principle . . . does not prove by his martyrdom that he has kept within the law.”

Just laws, properly applied, would never cause an upright person, endeavoring in good faith to serve Almighty God, to suffer “martyrdom”.

A law which results in “martyrdom” to one who practices a right principle is necessarily unconstitutional, in its application to the “martyred” one. If Jehovah’s witnesses “suffer martyrdom” because of this decision, it cannot properly and fairly be said that they have not obeyed the law. They have obeyed every law of the land which does not require them to violate the law of Almighty God, whose law is supreme, as is recognized by Cooley and Blackstone. If the Court rules that any law of the legislature is supreme, over the Constitution and God’s law, then we are without argument before this Court and rest our case entirely with Almighty God, JEHOVAH, the Supreme and Final Judge, who always *acts* to uphold His faithful servants, Luke 18:7, 8; Psalm 105:14, 15.

He who thinks that these misapplied ordinances will “stop” Jehovah’s witnesses errs, because even Adolf Hitler’s vain attempt has failed to *stop* them. That which is RIGHT can never be destroyed by laws of man. Jesus spoke the truth, and the rulers killed Him, but that never stopped the preaching of the gospel, which they thought they could stop. The law and decision involved here, although aimed at Jehovah’s witnesses, encourages nation-wide Nazi-like persecution of all who engage in pamphleteering on political, religious, scientific and social questions of importance, who cannot, because of conscience or lack of finance, purchase their “freedom license”.

A decision which wrongfully works oppression and great injury to a minority, such as Jehovah's witnesses, manifestly shows that it is not for the welfare of the nation and its people. From "a Christian nation" (*Church v. United States*, 143 U. S. 457) and a "city" of refuge established by the forefathers it will be transformed town by town into a cage of hypocrisy.

Such decision blindly licenses rule by wicked local city authorities and their *backers* throughout the land who hate liberty for those who do not agree with them.

"As a roaring lion, and a ranging bear; so is a wicked ruler over the poor people."—Proverbs 28: 15.

"When the righteous are in authority, the people rejoice: but when the wicked beareth rule, the people mourn."—Proverbs 29: 2.

Four Freedoms and Forefathers Oppressed

It should be remembered that the forefathers of this nation once were a suppressed and beaten minority, before fleeing as refugees to this continent.

"Thou shalt neither vex a *stranger*, nor oppress him; for ye were strangers in the land of Egypt."—Exodus 22: 21.

To sustain this law will push the people of this nation back into the intolerant condition from which the founding fathers fled, resulting in corrupting and suppression of President Roosevelt's "*four freedoms*".

Justice Byrnes

speaking at Chicago before the Illinois Bar Association, four days prior to delivery of this majority opinion, concerning suppression of minorities in this country said:

"Above the columns of the Supreme Court building, carved in marble are the words: 'Equal Justice Under Law'. Through the centuries these words have been engraved in the minds and hearts of men and women

struggling against oppression. They embody the aspirations we have cherished from the Sermon on the Mount through Magna Carta to the Four Freedoms. . . . We must by all means avoid developing among ourselves a Hitler-like contempt of other groups and creeds and races. We want no Hitler Justice here. We want no trials by ax-men instead of by juries. We know the meaning of Equal Justice Under Law. We know the blessings of Liberty. To preserve these we will give our all, God helping us."

It is exceedingly difficult to comprehend how the war being waged to preserve the *four freedoms* can have full support of the common people or succeed when, from within, the nation's highest court publicly decrees that the individual's right to exercise such freedoms is by sufferance of State officials* and that such rights can be limited through taxation, thus destroying most of said freedoms.

Jehovah's witnesses and Former Nations

This Court should reckon with the paramount fact, that it is judicially dealing with servants of Almighty God.

The course taken by Gamaliel and his statement is here apropos. Among other things he said: "Refrain from these men, and let them alone: . . . lest haply ye be found even to fight against God."—Acts 5: 34-39; see, also, Matthew 25: 40, 45; Mark 9: 42.

In this day no court in the world has occupied or now occupies the unique position of the United States Supreme Court. This Court has enjoyed a most vital role in the nation's history for the preservation of constitutional government and the application and maintenance of the democratic principles. It has the power to nullify or approve all acts of the legislative and executive branches of the state and federal governments.

* See Footnote No. 4, quotation from REED, J., page 12, supra.

For more than 150 years this Court has played a vi part in erecting the superstructure of the government a shielding constitutional liberties. The power vested in t Court is within certain spheres akin to that of an absolu monarch. Should the Court consider that it is dealing wi the servants of Almighty God, then it is well to review th history of some former nations whose kings in times pa dealt with them, adversely, and favorably, together with tl results thereof.

For kindness shown by the Egyptian ruler of old t Joseph and other of Jehovah's witnesses, Almighty Go greatly blessed and protected that nation. (Genesis, chap ters 41 through 50) Thereafter Pharaoh began a course o opposition and persecution of God's people. Then JEHO VAH sent His witness, Moses unto Pharaoh many times t request that the king permit His people to worship as Go had commanded. The king refused, each time becoming mor arrogant, harder and more cruel in his persecution o God's people. For this God sent the plagues upon Egypt. When Pharaoh's army pursued Moses and the children o Israel as they fled from Egypt it was, by Jehovah's power swallowed up and destroyed in the sea.—Exodus chapter 1 to 14, inclusive.

Hiram, king of Tyre, was favored by Jehovah God be cause of kindness shown to King Solomon, one of Jehovah's witnesses.—1 Kings, chapters 5 through 7.

For their persecution of Jehovah's servants, Almighty God destroyed the nations of Moab, Ammon, and Edom when their allied armies gathered against Jehovah's wit nesses under Jehoshaphat. (2 Chronicles 20: 1-37) Witness also, the destruction of an army of 1,000,000 Negroes who assaulted Asa, Jehovah's servant. (2 Chronicles 14) As to the destruction of Sennacherib's army for attempting de struction of Judah, see Isaiah, chapters 36 and 37. Because of the great defamation of Jehovah's name and the interfer ence with His witnesses through decrees and orders in

council, Jehoyah destroyed Babylon completely.—Jeremiah, chapters 50 and 51.

"Behold, the nations are as a drop of a bucket, and are counted as the small dust [of the balance [scales]]." "But if they will not obey, I will utterly pluck up and destroy that nation, saith the LORD."—Isaiah 40:15; Jeremiah 12:17.

Final Results

At the instance of Haman, a decree was made by the king of ancient Persia that all persons of the kingdom must bow down to Haman, prime minister. (Esther, chapter 3) Thus they framed mischief by law, as stated in Psalm 94:20. The Book of Esther adds: "And when Haman saw that Mordecai bowed not, nor did him reverence, then was Haman full of wrath . . . wherefore Haman sought to destroy all the Jews that were throughout the whole kingdom of Ahasuerus, even the people of Mordecai. . . . And Haman said unto king Ahasuerus, There is a certain people scattered abroad and dispersed among the people in all the provinces of thy kingdom; and their laws are diverse from all people, neither keep they the king's laws: therefore it is not for the king's profit to suffer them. If it please the king, let it be written that they may be destroyed," (Esther 3:5-9) Because of Mordecai's obedience to JEHOVAH and his refusal to obey the king's decree, arrangements were made to hang Mordecai. The gallows were built. At the time appointed for the hanging, Mordecai was vindicated, but Haman was caught in his own trap. He was hanged on the gallows he had prepared for Mordecai. Haman here prophetically pictures present-day enemy religionists opposing Jehovah. Almighty God delivered Mordecai.—Esther, chapters 4 through 7.

When the final history is written concerning the battle now being waged for the *four freedoms* by the democracies, the people of this land and those who govern will suddenly

realize that, though unpopular, despised and hated, Jehovah's witnesses have done more than anyone else to resist the "total war" now being waged on the home fronts against the liberties of all people. In time all such opposers will realize that they have not only battled against Jehovah's witnesses, but against ALMIGHTY GOD.

It is hoped that in time to come, if not before this motion is ruled upon, some members of this Court who joined in the majority opinion will conclude that this Court's decision was error, even as was commendably done here by Justices Black, Douglas and Murphy concerning the *Gobitis* case, to the delight of all liberty-lovers. We suggest that, although it is never too late "to be right", the best time to reach such conclusion *as to the present cases* would be before this motion is ruled upon. If such conclusion is expressed after the Court has lost jurisdiction, it will do little or no good to the nation or those injured. It is too late to lock the corral gate after the horse is stolen!

In this connection it is well to consider the words of Justice Sutherland, dissenting, in *Associated Press v. N. L. R. B.*, 301 U. S. 103, 141, as follows:

"Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship . . . ? If so, let them withstand all *beginnings* of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time."

Conclusion

Wherefore petitioners pray that the orders and judgments heretofore entered herein affirming the judgments of the courts below be set aside and held for naught, and on the briefs of the parties and *amicus curiae* briefs that this motion for rehearing be granted and the Court render an order reversing the judgments of the courts below or, in the alternative, order the causes to be reargued orally. Petitioners pray for such other relief as they may show themselves justly entitled to in the premises.

ROSCO JONES, *Petitioner*

LOIS BOWDEN and

ZADA SANDERS, *Petitioners*

CHARLES JOBIN, *Appellant*

By HAYDEN C. COVINGTON

Counsel for Petitioners and Appellant

Certificate

I, Hayden C. Covington, do hereby certify that the foregoing motion for rehearing is prepared and filed in good faith so that justice may be done and not for the purpose of delay.

HAYDEN C. COVINGTON

Counsel for Petitioners

2
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

Nos. 280, 314 and 966

280 ROSCO JONES, *Petitioner*,

v.

CITY OF OPELIKA, *Respondent*

ON WRIT OF CERTIORARI TO SUPREME COURT OF STATE OF ALABAMA.

314 LOIS BOWDEN and ZADA SANDERS, *Petitioners*,

v.

CITY OF FORT SMITH, *Respondent*

ON WRIT OF CERTIORARI TO SUPREME COURT OF
STATE OF ARKANSAS.

966 CHARLES JOBIN, *Appellant*,

v.

THE STATE OF ARIZONA, *Appellee*

APPEAL FROM SUPREME COURT OF STATE OF ARIZONA.

APPENDIX

to

PETITIONERS' MOTION

HAYDEN C. COVINGTON

Attorney for Petitioners

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APPENDIX
to
PETITIONERS' MOTION

■
Editorials
■

TIME

The Weekly Newsmagazine, June 22, 1942, p. 55.

Ominous Decision

The U.S. Supreme Court handed down a decision last week that directly affected only a small, freakish religious sect, but indirectly affected nothing less than freedom of conscience. . . .

* Outstanding churchmen were notably chary last week about expressing clear-cut opinions on the Supreme Court decision. But the press was outspoken.

NEWSWEEK

June 29, 1942, p. 68.

'The Boot Is On the Other Leg,' by Raymond Moley.

Now that the Supreme Court is being pounded for its last decision of the 1941-1942 term—its 5 to 4 vote in the Jehovah's witnesses case—we are hearing again that newspaper criticism helps Hitler by undermining public respect for government. The answer to the self-pitying lament that criticism causes loss of respect is simple. The way to be respected is to merit respect, . . .

The decision of the Supreme Court upholding the

imposition of fees on Jehovah's witnesses for the privilege of distributing religious tracts is just as shocking in its implications. For to whittle away the freedom of one religion is to attack the freedom of all religion. To suppress one liberty is to threaten all liberty. What greater irony can there be, when American boys are dying for the liberties of many peoples, than this impairment of religious liberty in America by the constituted guardians of our liberties? Cynical cracks of Washington lawyers that the Constitution is what the Court says it is do not obscure the plain language which guarantees our liberties. We all can read the document without aid of counsel. . . .

COLLIER'S

July 18, 1942, p. 70. Editorial.

The Supreme Court Errs

We are fighting a global war, as the Roosevelt Administration which appointed a majority of the present Supreme Court justices keeps telling us, to bring the "four freedoms" to the whole world. One of these freedoms is freedom of expression, a term which includes freedom of the press as guaranteed by our Bill of Rights. Another is freedom of religion.

Yet five out of the Supreme Court's nine justices saw fit recently to hand down a decision curtailing somebody's freedom of both press and religion. True, the somebody was nobody but the small and cantankerous sect known as Jehovah's witnesses. But this decision, which held that town governments can force this sect's tract-pushers to pay license fees as peddlers, can be used to legalize the licensing of producers of any publication sold on streets or newsstands. . . .

This decision's threat to religious and press liberty in this country is real and urgent. These two freedoms

can be wiped out if this decision stands. . . .

While freedom of religion and of the press are being done to death in this country, our boys will be fighting to bring those blessings to the rest of the nations of the world. There is some discrepancy somewhere in all this. . . .

THE PRESBYTERIAN GUARDIAN

Philadelphia, Pa., June 25, 1942, p. 179. Editorial.

A Dangerous Decision

[The Editor condemns the decision and among other things says:]

"We Bible-believing Christians also are a minority and our gospel is not popular. Our lot will not be a happy one if our freedom to propagate our faith can be limited by city councils."

CHRISTIANITY AND CRISIS

New York, N.Y., a biweekly, June 29, 1942, p. 7, under the heading "The Supreme Court on Religious Liberty" condemns the decision.

THE CHRISTIAN-EVANGELIST

National weekly of Disciples of Christ. St. Louis, Mo., June 25, 1942, p. 691, under heading "Unity or Uniformity", opposes the majority and declares: "The majority decision of the Supreme Court has dangerous implications as a precedent for future decisions in cases where the rights of conscience meet the enactments of local governments."

THE CHRISTIAN ADVOCATE

Methodist, Chicago, Ill., June 25, 1942, pp. 804-805, editorial.

A Momentous Decision

... But a license to sell religious literature is something entirely different. It is an instrument which can be used to exterminate, and, for the sake of democracy's future, we would do well to remember that. ...

ZION'S HERALD

Methodist, Boston, Mass., June 24, 1942, p. 604, under the heading "Accomplishing a Wrong by Indirection" editorially says:

"Decidedly unjust is the technique sometimes employed to 'get rid' of a troublesome man or a 'nuisance' movement by an indirect attack which avoids a head-on conflict over the main issue. ... We therefore again protest and register the conviction that a great wrong has been done to the cause of liberty by the effort to tax the Witnesses off the street."

THE CHRISTIAN LEADER

Universalist, Boston, Mass., June 20, 1942, p. 355, under the title "Good News for Tyrants and Bigots" editorially condemns the decision of the majority, and, among other things, says:

"Everyone who knows anything about municipal government in this country knows that these are real and immediate dangers. And everyone should realize that every danger to which this decision exposes the religious press is also a real and immediate danger to the secular press. ...

"Why? Because this decision sets aside our most

precious constitutional guarantees. At one stroke three of the freedoms for which we fight are put in dire jeopardy."

THE WATCHMAN EXAMINER

Baptist, New York, N.Y., July 2, 1942, p. 656, under the title "A Danger to Freedom" editorially declares:

"The principle of religious freedom must protect the rights of minorities as well as those of the larger groups. Minorities whose civil rights are threatened are generally small and, to many, obnoxious. They may or may not be unworthy, yet the sincerity with which we uphold the Bill of Rights is tested by the treatment we accord them. . . . While the youth of America is dying on the battlefields of the world, or falling to death out of the air, or perishing in the sea to secure for the world the Four Freedoms and other freedoms mentioned in the American Bill of Rights, it is nothing short of tragic that the Supreme Court should give its august authority to the suppression of a small and obnoxious sect and in so doing undermine all the freedoms."

THE COMMONWEAL

Roman Catholic, New York, N.Y., June 26, 1942, p. 221, under "Liberty is Liberty" editorially says:

"The decisions of the Supreme Court with regard to the Gobitis case (two years ago) and the recent case covering the requirement of commercial licenses for distributors of leaflets both seem to us to be in a dangerously wrong direction."

THE CHRISTIAN CENTURY

Undenominational weekly, Chicago, Ill., June 17, 1942, p. 771, editorially states:

"Taken together, the stirring dissenting opinions entered by the chief justice and his colleagues in this case show how precarious is the basis for all our freedoms, and how grave is the danger that in the very hour when the President proclaims a crusade for the four freedoms throughout the earth, they may be destroyed at home."

THE CHRISTIAN CENTURY

Chicago, June 24, 1942, pp. 806-807, George A. Coe, under "Our Waning Religious Liberties", says:

"... Though freedom of the press remains, its meaning and effect are partly destroyed and wholly jeopardized.

"This is a history of descent from heights of religious liberty that we had supposed to be secure, in our country, for all time. . . ."

INDIANAPOLIS SUNDAY STAR

June 21, 1942.

I. U. Journalism Head Sees Danger To Free Press In High Court Ruling.

Papers Could Be Tated Out of Existence Under Jehovah's witnesses Decision, Stempel Warns.

By JOHN E. STEMPEL, Head of Department of Journalism, Indiana University.

"Suppose an unscrupulous boss held political control of the city of Indianapolis, and it came to his attention that the press was about to reveal proof of graft and mismanagement in city affairs. Through

his political proteges such a leader might cause hurried enactment of a license fee of 5 or 10 cents a copy on each newspaper published in the city.

" . . . Should any newspaper attempt to bargain for its freedom by agreeing to suppress charge of misgovernment in return for repeal of the license fee, it would forever lose its freedom. . . .

"The prevailing opinion in the Jehovah's witnesses case opens a new way for unscrupulous politicians to threaten economic ruin to newspapers that publish material not to their liking. . . .

"That power in the hands of intolerant, dictatorial leaders could soon repress what we know today as freedom of thought, religion and speech. . . .

"A time of crisis like the present demands sound thinking concerning our freedoms. We are fighting for them, and in fighting for them we do not wish to lose them."

MINNEAPOLIS MORNING TRIBUNE

Saturday, June 13, 1942. Editorial.

The Supreme Court Makes a Dangerous Decision

. . . Ordinarily what is popular requires no safeguarding. It is for the protection of the unpopular advocates of unpopular causes that these guarantees of freedom of speech, religion and press were written into the constitution. . . .

The supreme court has, on more than one occasion, reversed itself and it is to be hoped that it will soon recognize its latest error.

CHICAGO DAILY NEWS

Thursday, June 11, 1942. Editorial.

A Hard Case

... But Americans are specially sensitive to religious discriminations. Millions of us are descended from sectarian nonconformists of many sorts who came to this continent, or were sent here involuntarily, because they irked the majorities of the old countries as much as the Jehovah's witness sect irritates and bores our majority today. The fact that no sooner had religious refugees arrived in colonial America than they began to persecute each other has also permeated our traditions and sharpened our sensitiveness to legal restrictions upon proselytism of all sorts.

... The parallelism of restrictions upon the sale of religious tracts to the stamp acts designed to levy penal taxation on newspapers and other printed matter that did so much to incite the American Revolution is another angle of the case that simply 'sticks in the craw' of thousands of Americans whose souls are steeped in the sentiments of old Sam Adams, Tom Paine and Thomas Jefferson.

LOUISVILLE COURIER JOURNAL

June 10, 1942, Editorial.

These Vital Rights Lincoln Spoke Of

Jehovah's witnesses are making quite a record for judicial construction of religious liberty, one of the "vital rights of minorities and individuals," which LINCOLN said "are so plainly assured . . . in the Constitution that controversies never arise concerning them."

... The Justices have seen conscientious objectors excused from defending the flag while equally con-

scientious little objectors to obeisance to any earthly symbol were expelled from school for merely refusing to perform a perfunctory gesture in front of it. . . .

And the Chief Justice has gained enough recruits on the bench to indicate that this "vital right" isn't finally disposed of, even though the great LINCOLN might not have been able to see how a controversy could possibly arise over it.

NEW YORK POST

Thursday, June 11, 1942.

I'd Rather Be Right

By Samuel Grafton

. . . Ruling on the right of a book peddler to peddle books, the Court gives us a number of round and beautiful words: "The mind and spirit of man remain forever free."

But he still needs a license, says the Court. So his mind and spirit remain forever free in Fort Smith, Arkansas, for example, but if he actually wants to sell books, he must pay \$10 a week. His mind and spirit are free so long as they sit on a porch, or are sound asleep in bed. If his mind and spirit want to get up and go somewhere, their freedom ends and they must have a license.

The Right to \$10

Under this doctrine, only the unused mind is free; only the spirit which never soars has the right to fly. The Court has ruled firmly that if you don't use your mind, no one may interfere with it. If you do, they may. It becomes law that no one may abridge the right of free press, except against persons trying to use it. All others keep this right, probably in a drawer, under satchet.

From now on, in Fort Smith, you have to have \$10 to have the right of free press. If, from now on, the right of free press is to have any meaning, the Constitution will have to be amended to give everybody the right to \$10.

This is what happens when you give the people beautiful round words, and take away the substance of their liberties. If your mind isn't big enough to understand the importance of \$10, it isn't big enough to understand the right of free press. . . .

We, of the real world, say that religious liberty includes enough calories to carry you to church, and that unnecessary hunger is unlawful interference with freedom of worship.

TOWNSEND NATIONAL WEEKLY

Saturday, June 27, 1942.

Inside Washington

By Hugh Russell Fraser

June 8, 1942, will go down as a black day in American history. On that day, in a far-reaching case, the supreme court pronounced an amazing abridgment of the bill of rights. . . .

In fact, the deed was so shocking that Chief Justice Stone and three of his colleagues, Justices Black, Douglas and Murphy, resorted to extraordinary language to indict the majority decision as an invasion of the freedom of religion, nullifying the first amendment to the Constitution. . . .

The tragedy of June 8 will yet be undone.

NEW YORK TIMES

June 10, 1942. Editorial.

A Test of Freedom

... We can see this case in its right light only if we try to imagine one of our established religious groups penalized in the same way. We know it could not be so penalized, because its methods of appeal would not offend people and because it would have a following capable of effective protest. Jehovah's witnesses suffer because they are a small and, to many, an obnoxious sect . . .

It seems to us that the majority opinion in this instance lends itself to the whittling down of freedom of speech, freedom of religion and freedom of the press.

THE ERA

Bradford, Pa., Wednesday, June 10, 1942. Editorial.

Freedom at A Law-Maker's Discretion

Free speech, free press and freedom to worship God according to the dictates of the individual's conscience have been reduced to the plane of expediency, by a decision of the Supreme Court of the United States. . . .

They are amazed to learn at this late date those rights can be modified by law to limit them to the usages some dictator in control of the Congress desires. They are astonished to find the freedom for which they are fighting has strings attached which hobble their liberty. They are particularly alarmed over the high court's opinion expressed at a time when the world is purportedly fighting to preserve the free American way of life—a freedom construed to embody

the Bill of Rights as understood to exist from the days of the Revolution. . . .

Whatever the reason the American public is disquieted by the action.

THE WASHINGTON [D.C.] POST

Wednesday, June 10, 1942. Editorial.

Religion And Taxation

Not perhaps since the classical case of *Murphy versus Madison* has there been a decision by the Supreme Court so momentous in its implications as the decision delivered on Monday and written by Mr. Justice Reed and supported by four other justices to make a majority. . . .

Undeniably, the opening wedge for this latest restriction on religious liberty by the Supreme Court was the decision of the same tribunal two years ago that freedom of conscience must not include scruples against saluting the Flag.

CHICAGO DAILY TRIBUNE

Wednesday, June 10, 1942. Editorial.

A Blow to Freedom

. . . It was a very bad decision, so bad that it recalls the abuses listed in the Declaration of Independence. . . .

The minority had read history. The minority knew that the classic method of repression is licensing. The great fight for the freedom of the press was the fight against just such prior restraints on publication. The people of this country had thought that fight had been won. . . . By restraints on distribution, books, newspapers, and magazines may be prevented from reach-

ing the readers quite as effectively as by the licensing of publishing houses. . . .

The fundamental question is whether such people in this country are free to express such views. The answer is that if they aren't, there is no freedom in this country. The guarantees of freedom of the press and freedom of religion are not needed to authorize expressions of popular judgment in politics and religion.

. . . The only way which has ever been found of protecting the right to express the truth is to permit the unhampered expression of all opinion, popular or unpopular, true or false.

THE NEWS AND OBSERVER

Raleigh, N. C. Editorial.

Another Great Dissent

There was an old Roman maxim, "In war laws are silent." That was an imperialist doctrine for an empire, but it can have no place in a democratic government. And yet, there is danger of limitations on the Four Freedoms in this country when the strain of war governs. But if Freedom of Religion and Freedom of Speech and Freedom of the Press are to be denied in our country, can we boast of a real democracy?

THE NEW LEADER

New York, N.Y., Saturday, June 13, 1942. Editorial.

Supreme Justices Confess

. . . They have reversed themselves within these two years. Now they publicly confess that Supreme Court decisions are not holy, eternal, above criticism or correction. They have performed a distinguished service to their country.

THE NASHVILLE TENNESSEAN

Monday, June 15, 1942.

Grafton Urges War on Tax on Freedom. Calls Supreme Court's Fort Smith Ruling Invitation To Put Price list on Ancient Bill of Rights—Equivalent of Poll Tax.

I'd Rather Be Right

By Samuel Grafton

New York, June 14—...

A Set of Sacred \$10 Rights.

If anything were needed to show that the Supreme Court decision (a bare 5-4, put over by the perfectly shocking acquiescence of Mr. Justice Frankfurter) was a retrograde decision, that by it the court speeded backward into a dark tunnel like a man with his foot caught in a roller-coaster, it is this comparison.

What's going on here, anyway? Are we going to let local government set up a kind of judicial Sears, Roebuck catalogue, with prices on the various items in the Bill of Rights?

It is clear that in the Fort Smith case the court has poll-taxed the right of free press. It has washed out that right by allowing a price to be put on it, just as the right to vote has been washed out in eight Southern states by the imposition of a price.

A Dozen New Poll Taxes

The poll-tax comparison blows up the court's pretensions that it has merely permitted local government, in its exquisitely local wisdom, to set up necessary and practical conditions for using the right of free press, without hurt or competitive advantage to anyone, ti-da-ti-da. . . .

For, from now on, any city council can add its own amendment to the Constitution by outfitting the Bill of Rights with a local price list. . . .

All right, it's a fight. Let's fight it. I'll help. And I'll state the issue: a fight to establish firmly the principle that no right guaranteed to the people under the Constitution can be rendered subject to money payment; that, in even briefer language, the Constitution of the United States is not a tart.

THE DETROIT NEWS

Thursday, June 11, 1942.

The Commentator: By W. K. Kelsey:

Three of Our Freedoms

Looks as if the Supreme Court majority came an awful cropper in the three cases decided last Monday concerning freedom of speech, freedom of the press, and freedom of religion. Looks, indeed, as if the Court has reversed its attitude taken in previous decisions.

THE CONSTITUTION

Atlanta, Ga., Monday June 22, 1942.

Good Morning: By Louie D. Newton.

"Precious Rights . . ."

The decision of the United States supreme court a few days ago . . . may well be regarded as one of the most serious denials of constitutional rights within the history of the American government.

ST. LOUIS DAILY GLOBE-DEMOCRAT

Wednesday morning, June 10, 1942. Editorial.

'No Law Abridging . . .'

The Supreme Court appears to have hedged in the right of free religion and speech in a decision of last Monday. . . .

The Supreme Court decision seems to be an entering wedge which endangers these 150-year-old principles by permitting a city licensing of any man's worship or speech. The fact that it was a split decision and that three members of the court took occasion to reverse themselves on the flag-saluting case of 1940, indicates it may not be permanent. It would be a precedent latent with peril to personal freedom.

ST. LOUIS POST-DISPATCH

June 9, 1942. Editorial.

A Blow to Religious Freedom

... All religious organizations are obliged to resort to one method or another to raise funds. To require one of them to take out a peddler's license for its particular method of raising funds strikes us as a dangerous intrusion on freedom of worship. If a religious organization is subject to city or state or national authority when it goes about the business of supporting itself, this authority conceivably could be pushed to the point of suppressing sects disliked by lawmakers. If a small sect can be denied its constitutional rights, the way is open to deny them to other sects.

NORFOLK VIRGINIAN-PILOT

Wednesday, June 10, 1942. Editorial.

We Side With the Minority

Only a little less shocking than the Gobitis (compulsory flag-saluting) decision of 1940, is the Supreme Court's decision upholding the right of municipalities to require those who distribute religious tracts or publications as a method of raising money for their churches to pay city licenses for the privilege...

The majority opinion makes the act of fund-raising

the test of taxability rather than the ideological mission of the fund raising. If that is reconcilable with the intent of the Bill of Rights, the street sale of a publication as an incident of religious propaganda is on the same level with the street sale of a publication to promote the sale, for private profit, of the sheet music of Tin Pan Alley.

... The right of free speech and free religion is a right bought dearly by centuries of struggle. The right to tax the instrumentalities of free speech and free religion is not "equally precious to mankind," but intrinsically suspect among all free peoples. ...

The two opinions can be reconciled only by a factitious defense of the right of taxation in an exercise of that right which clearly manifests the intention of the taxing power not to raise needed public revenue, but to bring to bear on the religious activities of a minority the majority's spiteful dislike of the minority's doctrines and propagandist behavior.

BURLINGTON [VT.] FREE PRESS

June 10, 1942. Editorial.

Limiting Free Speech

... That point of view is understandable, but we believe it treads on dangerous grounds and, carried to its logical conclusion, threatens the whole constitutional right of free speech.

SOUTH BEND [IND.] TRIBUNE

June 11, 1942. Editorial.

Dangerous

Like the power to tax the power to license is power to destroy. Government licensing of publications can not be harmonized with fundamental Americanism.

ST. LOUIS STAR-TIMES

An Un-American Decision

... The majority decision plays directly into the hands of dictatorial political bosses like Mayor Hague of Jersey City. It provides the means by which a corrupt public official could suppress those who would expose him. Its principle is in no respect different from that of governmental licensing of the press and other agencies for the expression of opinion.

THE ATLANTA JOURNAL

Atlanta, Ga., June 12, 1942. Editorial.

Religious Freedom

... Great principles are so bound up with small circumstances that it is often hard to distinguish what is abiding and basic from what is transient and superficial. . . . When we come to deal with that realm of human conduct covered by the Bill of Rights, we can afford to err on the side of liberal interpretation rather than deny the fundamentals of freedom to any person, however lowly, or to any sect, however eccentric. . . .

Time and education and common sense will dispose of the vagaries which are continually springing up in the field of religion; but when the rights of free conscience and free worship are abridged on any ground, save the plainest grounds of common decency and public welfare, who can say what the consequence may be?

TIMES-HERALD

Washington, D. C., Tuesday, June 9, 1942.

Jehovah Witnesses Lose High Court Test. Violent Dissents Mark 5-4 Ruling on Right to License Pamphlet Sale.

By Chesly Manly

... Chief Justice Stone's dissenting opinion was one of the most vehement in the Court's history. Even more significant, however, was an extraordinary one paragraph separate note in which three justices—Hugo L. Black, William O. Douglas and Frank Murphy—reversed the position they took in a similar case two years ago because of apprehensions as to the current trends respecting the rights and views of minorities.

DAILY NEWS

New York, N. Y., Friday, June 12, 1942. Editorial.

The Supreme Court and Freedom of the Press

The United States Supreme Court last Monday handed down a decision which has a sinister look to us.

It was a 5-4 decision; and it seems to us that the majority of five justices in this decision chopped a chip out of the first article of the Bill of Rights (Amendment 1 of the Constitution), . . .

Associate Justice Stanley Reed delivered the majority opinion. It was concurred in by Associate Justices J. F. Byrnes, Felix Frankfurter, R. H. Jackson and O. J. Roberts. We may be dumb, but the reasoning unrolled by these gentlemen in the majority opinion is too vague, finespun, and hairsplitting for us to grasp.

Chief Justice Harlan F. Stone, on the other hand, ripped out a sizzling dissenting opinion which we have

no trouble understanding. The Chief Justice stood squarely on the Bill of Rights and roared for its preservation as written.

RICHMOND [VA.] TIMES-DISPATCH

Friday, June 12, 1942. Editorial.

A Blow at Religious Freedom

We have yet to find even one favorable editorial comment concerning the United States Supreme Court's 5-to-4 decision on Monday that a city ordinance requiring a license for peddlers may be applied to a member of Jehovah's witnesses engaged in distributing literature for which contributions are solicited. . . .

Now that three members of the Supreme Court have recanted publicly, it may be only a question of time before others follow suit, and religious freedom no longer is threatened by the very tribunal which should be its bulwark.

THE DAILY HOME NEWS

New Brunswick, N. J., Wednesday, June 10, 1942.
Editorial.

Dangerous Precedent

. . . But validation of such laws, which in malicious hands can be all too easily twisted into open suppression of minorities, is not the way. Wartime is a period of emotion and stress, when civil liberties must sometimes go by the board in the interest of national safety. They should not, however, be thrown to the winds as they are in this ruling. The Supreme Court, it appears, has blundered, and it means a long and arduous fight to regain the lost ground.

LEXINGTON [KY.] LEADER

June 17, 1942.

Taxation by Tyrants

[From] *Editor and Publisher*

We must disagree emphatically with the five learned justices of the Supreme Court of the United States whose majority decision in the Jehovah's witnesses case . . .

The majority opinion in this case is dangerous doctrine for a land whose crusading editors step hard and often on the toes of local tyrants holding taxing powers.

There can be no relief from oppression of the press and suppression of newspapers until the Supreme Court reverses its stand taken in this week's decision.

CLEVELAND PLAIN DEALER

An Economist's Point of View

By Russell Weisman

At the pain of being advised by some of my attorney friends to stick to my business and finance I am venturing the opinion, as a citizen, that the Supreme Court in a recent decision abridged two sacred rights guaranteed by the Constitution—freedom of religion and of press. . . .

As the weeks have passed and its implications have been better understood, there is more and more comment to the effect that they are unfortunate and that the court has allowed its thinking to be affected too much by the present war emergency and too little by the fact that we are fighting for the preservation of the very freedoms which are abridged by this particular decision. . . .

THE HARTFORD [CONN.] TIMES

Saturday, June 20, 1942.

Religious Freedom

By Samuel B. Pettengill

But the right to worship God according to your faith includes the right to propagate that faith, to win converts to it, to disseminate tracts, books, sermons, to sow seed in human souls and bring it to harvest by fair persuasion, if one can. . . .

The right to propagate the faith has now been chained to the chariots of new Caesars—these arrogant creatures who put their concepts of "the general welfare" above the conscience of men.

"Tyrants," said Abraham Lincoln, "always bestride the necks of the people on the theory that it is for the people's good," and that they know what is good for the people, and the people do not. . . .

BOSTON TRAVELER

June 11, 1942. Editorial.

Free Speech the Issue

The Supreme Court's final decision day produced one decision that should not be final. It upheld the right of cities to charge license fees for the distribution of religious literature. . . .

It is entirely beside the point to argue that the taxes in question are small, that the religious group at which they are aimed is insignificant. Sometimes great and abiding truths grow from humble beginnings.

Would the twelve fishermen of Galilee have had the twenty-five dollars for a preacher's license in Casa Grande, Arizona?

THE PROGRESSIVE

Madison, Wis., June 21, 1942.

... No one who examines the facts which led to the court test can escape the conclusion that the license taxes imposed on Jehovah's witnesses were designed to accomplish a single purpose, and that was to prevent that sect from distributing its pamphlets and seeking contributions. The Supreme Court has thus ruled, in effect, that "equally precious" with the right of freedom of speech, the press, and religion is the right to suppress these constitutional guarantees by oppressive taxation!

A BLACK DAY IN THE COURT

By Hugh Russell Fraser

[*The Progressive*, Madison, Wis., June 21, 1942.]

The Supreme Court wrote a shameful decision in the Jehovah's witnesses case.

True, the verdict was 5 to 4, but the fact that five of the members of the Court, four of them appointed by President Roosevelt, should forsake the plain, intent and meaning of the Bill of Rights and enter the realm of sophistry, is an indictment of the status of caliber of the Court today. . . .

But the majority of the Court, through Mr. Justice Reed, has spoken. The First Amendment, it appears, extends a protecting arm around various and sundry persons, but not Jehovah's witnesses. . . .

But the really shocking news came from Washington, D. C., not Opelika.

THE TABLET

Roman Catholic, Brooklyn, N. Y., June 20, 1942.
Editorial.

... But it is quite possible that a determined minority, hostile to religion, in control of local government, might use this decision of the Supreme Court to impose prohibitive taxation upon a peaceful religious majority, carrying out its valuable religious program in public assembly, in the press or by house-to-house canvass. Even the taking up of a parish census might be construed by such hostile authorities as within the scope of such prohibitive taxation.

... We hold with the dissenting opinion against the decision.

OUR SUNDAY VISITOR

Roman Catholic, Fort Wayne (Huntington), Indiana, June 21, 1942, under its own heading "U. S. Court Decision Endangers Freedom of All Religions", reproduces entire article by Clifford B. Ward published originally in the Fort Wayne *News-Sentinel*, among other things, saying:

"Even more dangerous than the decision itself is the philosophy of the majority of the court in using the word 'privileges' to apply to freedom of the press, freedom of speech and freedom of religion. If these freedoms are 'privileges,' they are not 'inalienable rights' and the very essence of our Constitutional protection is destroyed."

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CHARLES ELMORE SHIPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

Nos. 280, 314 and 966

■
280 ROSCO JONES, *Petitioner,*

v.

CITY OF OPELIKA, *Respondent*

ON WRIT OF CERTIORARI TO

SUPREME COURT OF STATE OF ALABAMA.

■
314 LOIS BOWDEN and ZADA SANDERS, *Petitioners,*

v.

CITY OF FORT SMITH, *Respondent*

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THE STATE OF ARIZONA, *Appellee*

APPEAL FROM SUPREME COURT OF STATE OF ARIZONA.

■
ADDITIONAL SUGGESTIONS and AUTHORITIES

supporting Petitioners'

MOTION FOR REHEARING

HAYDEN C. COVINGTON

Attorney for Petitioners

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MAY IT PLEASE THE COURT:

Issues raised for the first time in the majority opinion and answered in the motion for rehearing need additional discussion so as to call to the attention of this honorable court new matter, authorities and for-

mer decisions of this court not included in the motion.

The holding of the court that the amount of taxes imposed on freedoms of press and worship should be attacked as excessive needs additional discussion by the Court, in view of former decisions here brought to the attention of the Court. The Court says that it is only the *amount* of the tax which can be complained of by claiming it is *excessive* and that if no complaint is made the complaint against the levying of the tax in any amount cannot be sustained because the taxes here imposed are constitutional and within the taxing power of the state.

It has always been the holding of this Court that when it is found that the tax is proper and constitutional such tax cannot be upset as a "substantial clog" or *excessive* by the judiciary, state or federal, including this Court.

On the contrary, however, when there is absence of any power for either the national or a state legislative body to accomplish by legislative device, such as taxation, that which causes an invincible, irreconcilable and indubitable repugnancy between the statute (or ordinance) and the constitutionally shielded inherent *fundamental personal right*, the judicial corrective has been, can and ought, under the mandate of the Constitution, to be applied.

The statement by the majority opinion on this matter to the effect that amount of taxes can be questioned, without consideration or discussion of prior decisions of this Court, leaves the petitioners and all persons similarly situated in a dilemma of the worst kind.

In *Veazie Bank v. Fenno*, 8 Wall. 533, the validity of a tax law which increased a tax on the circulating notes of persons and state banks from 1 per centum to 10 per centum was in question. It was insisted that the tax was excessive, so excessive as to indicate a purpose of Con-

gress to destroy the franchise of a bank, etc. On page 548 this Court said:

"The first answer to this is that the judiciary cannot prescribe to the legislative departments of the government limitations upon its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution."

In the "Child Labor Tax Case", 259 U. S. 20, this Court reviews the above and other cases and, speaking through Chief Justice Taft, says:

"It will be observed that the sole objection to the tax there was its excessive character. Nothing else appeared on the face of the act. It was an increase of a tax admittedly legal to a higher rate and that was all [p. 41] . . . "

McCray v. United States, 195 U.S. 27, like the *Veazie Bank* case, supra, involved the increase of an excise tax upon a subject properly taxable in which the tax payer claimed that the tax had become invalid because the increase was excessive, i. e., a "substantial clog". It was a tax on oleomargarine, a substitute for butter. The tax on white oleomargarine was one quarter of a cent a pound, and on the yellow oleomargarine was first two cents and then by the act in question increased to ten cents per pound. This Court held that the discretion of Congress in the exercise of its constitutional powers to levy excise taxes could not be controlled or

limited by the courts because the latter might deem the incidence of the tax oppressive or even destructive. There the Court said:

"The proposition that where a tax is imposed which is within the grant of powers, and which does not conflict with any express constitutional limitation, the courts may hold the tax to be void because it is deemed that the tax is too high, is absolutely disposed of by the opinions in the cases hitherto cited, and which expressly hold, to repeat again the language of one of the cases (*Spencer v. Merchant* [125 U. S. 345]), that 'The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers.' The power to tax may be exercised oppressively upon persons; but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."

But, under constitutional mandate, when constitutional limits are overstepped by lawmaking or executive agencies, the judicial department must, can and did refuse to permit legislation passed in the exercise of the strongest power of the federal government, the power to tax.¹

A fortiori, the ultimate judicial corrective is applicable with propriety when fundamental federal-citizen rights shielded by the First and Fourteenth Amendments against state encroachment are abridged (1) by enforcement of legislation unconstitutional *on its face*,² or (2) by *misapplication*, as here, and/or

¹ *Bailey v. Drèzel* ("Child Labor Tax Case"), 259 U. S. 26 (1922).

² Cf. *Bussey v. Dist. of Columbia*, petition for writ of certiorari pending in this Court, No. 235 Oct. Term 1942.

³ *Lovett v. Griffin*, 303 U. S. 444.

misconstruction of legislation that is in fact constitutional and proper.⁴

The case of *Flint v. Stone Tracy Co.*, 220 U. S. 107, involved the validity of a license tax levied on the doing of business by all corporations, joint stock companies, associations organized for profit having a capital stock represented by shares, and insurance companies. The excise or license tax was measured by the net income of the corporation. There was not in that case the slightest doubt that the tax was a tax, and a tax for revenue, but it was attacked on the ground that such a tax could be made excessive and thus used by Congress to destroy the existence of state corporations. To this the Court gave the same answer as in the *Veazie Bank* and *McCray* cases.

In the "Child Labor Tax Case", *supra*, the following language seems appropriately descriptive of the majority opinion in the case at bar, to wit, "To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states." In the majority opinion here the rights of freedom of press and of worship are 'completely wiped out'. We quote further from Chief Justice Taft: "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards."

If this Court takes the position that the amount required here is a "regulatory fee", then we say that

⁴ Cf. *Minersville Dist. v. Gobitis*, 310 U. S. 586, where constitutionality of a state statute as construed and applied was dealt with only in the dissenting opinion of STONE, J., the unhappy decision based upon the majority opinion being sharply confined to *prima facie* constitutionality of the statute.

the tax is clearly within that condemned in the "Child Labor Tax Case" because it immediately becomes a *penalty* imposed upon the exercise of constitutional rights. It should be kept in mind that the laws here are admittedly NOT regulatory but purely revenue measures as shown on their faces or stipulated by the parties. One paying the tax can go anywhere at any time and carry on his "licensed" business without interference from the licensing authority, except in the City of Opelika, where the censorial *uncontrolled* right to revoke a license is retained by the ordinance.

In discussing the question presented on page 10 of the majority (slip) opinion in the *Jones v. Opelika* case the Court says that *taxation* is not interdicted by the Constitution as an abridgment of freedoms of worship and press. Then the Court cites the case of *Grosjean v. American Press Co.*, 297 U. S. 233, just following such statement. It is to be noticed that in the *Grosjean* case this Court knocked down a LICENSE TAX imposed without requiring the newspaper to contend and without holding that the amount was excessive. The *Grosjean* case is so nearly in point to this that, in view of the fact that this Court fails to discuss that opinion, we desire to call certain quotations from same to the attention of the Court now. In the *Grosjean* case this Court said:

"The tax imposed is designated a 'license tax for the privilege of engaging in such business', that is to say the business of selling, or making any charge for [commercial] advertising. . . . The framers of the First Amendment were familiar with the English struggle, which then had continued for nearly eighty years, at the end of which time it culminated in a lasting abandonment of the obnoxious taxes. The framers were likewise familiar with

the then recent Massachusetts episode; and while that occurrence did much to bring about the adoption of the amendment (see *Pennsylvania and the Federal Constitution*, 1888, p. 181), the predominant influence must have come from the English experience. It is impossible to concede that by the words 'freedom of the press' the framers of the amendment intended to adopt merely the narrow view, then reflected by the law of England that such freedom consisted only in immunity from previous censorship; for this abuse had then permanently disappeared from English practice. It is equally impossible to believe that it was not intended to bring within the reach of these words such modes of restraint as were embodied in the *two forms of taxation* already described. . . . In the light of all that has now been said, it is evident that the restricted rules of the English law in respect of the freedom of the press in force when the Constitution was adopted were never accepted by the American colonists, and that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment, to preclude the states, from adopting *any form of previous restraint upon printed publications*, or their *circulation*, including that which had theretofore been effected by these two well known and odious methods.

"This Court had occasion in *Near v. Minnesota*, supra, . . . and the Court was careful *not* to limit the protection of the right to any particular way of abridging it. . . .

"Judge Cooley has laid down the test to be applied--'The evils to be prevented were not the censorship of the press merely, but *any action* of the government by means of which it might prevent

such *free* and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.' " [Italics added] 2 Cooley's *Constitutional Limitations*, 8th ed., p. 886. -

In further proof of the immediate *bad effects* of the June 8 decision in this case, in addition to those mentioned in the motion, it seems fitting to call attention to the fact that on June 9, 1942, an aged couple, R. J. Adair and wife, Jehovah's witnesses, were arrested in Caruthersville, Missouri, under a local license-tax law. The local city attorney *engineered* the arrests on basis of an Associated Press news dispatch of the decision in this case. At their trial in the Municipal Court the two could not obtain counsel because of hatred worked up among the local populace by the city attorney. They represented themselves and urged that the ordinance did not apply to them because ordained ministers distributing books were exempted from the terms of such ordinances by statute of the state. (See Section 14608, Missouri Revised Statutes; *Trenton v. Clayton*, 50 Mo. App. 536, 539-540.) Such case and statute specifically exempted defendants. The trial was attended by a large crowd of mobsters, friends of the city attorney. Immediately the defendants were committed to jail after being tried, convicted and denied bail or the right of appeal on basis of the city attorney's argument that it was 'unnecessary since the United States Supreme Court had disposed of the question on June 8, 1942' in the *Jones v. Opelika* case. Their two friends offered, in open court, to take an appeal and to make cash or property bond. In full view of the judge, city attorney and law-enforcing officers the angry mob attending the trial viciously assaulted those friends while attempting to perfect the appeals for defendants,

beating them until blood poured out of their bodies beyond endurance, and inflicted serious and permanent bodily injury and damage with iron instruments, fists and shoes of kicking feet until victims almost died. They were driven out of town and denied medical treatment and the right of helping to perfect said appeals on the day of the trials. Under the law of Missouri the appeal must be taken on the day of trial in such cases. Attorneys in an adjoining county were employed to secure their release. The mob, with the consent of the local officials, threatened those attorneys with death if they attempted to do anything in their behalf or attempted to secure release of the defendants. After many days of fruitless effort and local opposition to legal process the attorneys abandoned the case. On August 28, 1942, after being in jail for *seventy-eight* (78) days (of a 121-day sentence assessed against each), undergoing much suffering and living in unhealthy surroundings, these two ordained ministers of the gospel were released by order of Missouri Supreme Court obtained by still other counsel on application for writ of habeas corpus.

This is cited to show how eager and prompt are law-enforcing *officials* and mobsters in some communities to follow decisions of this Court only when such are adverse to Jehovah's witnesses.

We submit that the motion for rehearing should be granted.

HAYDEN C. COVINGTON
Attorney for Petitioners

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AUG 31 1942

CHARLES ELMORE JR.
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941.

ROSCO JONES,

Petitioner,

against

CITY OF OPELIKA.

No. 280.

LOIS BOWDEN and ZADA SANDERS,

Petitioners,

against

CITY OF FORT SMITH, ARKANSAS.

No. 314.

CHARLES JOBIN,

Appellant,

against

THE STATE OF ARIZONA.

No. 966.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE ON APPLICATION FOR REHEARING.

The American Civil Liberties Union, which filed a brief as amicus curiae in two of the above cases, respectfully urges this Court to grant a rehearing in all three of them. The seriousness of the restriction on freedom of the press and of religion which will result if the decision of the Court stands, the fact that the division within the Court was so close, justify, we believe, a further consideration of the problem here presented.

It is evident that the decision of the majority has greatly curtailed the constitutional protection of freedom of speech, of the press and of religion. Indeed, these freedoms are given less protection from state interference than transactions in commerce have been given. For this Court has consistently struck down all attempts on the part of states or their subdivisions to license the solicitation of orders in interstate commerce. (See *Sabine Robbins v. Shelby County Taxing District*, 120 U. S. 489, 494; *Real Silk Hosiery Mills v. City of Portland*, 368 U. S. 325, 335.) The business interests affected in those cases were not put to the burden of proving that the amounts exacted were unreasonable.

Yet here, where much weightier matters than commerce are involved, the Court has imposed such a burden on petitioners, evidently upon the theory that the ordinances under review exacted fees as compensation for services rendered. However, the ordinances did not purport to be of this character or to be other than general taxing measures; nor were they construed by any of the State Supreme Courts to provide for reimbursement for expenses incurred by the city in policing the streets. This Court, in commerce cases, has laid down the definite rule that license taxes will be struck down where it did not "affirmatively" appear that the licenses were imposed, not as ordinary taxes, but as reimbursement for expenses incurred by the taxing authority. (*Bingaman v. Golden Eagle Western Lines*, 297 U. S. 626, 628; *Ingels v. Morf*, 300 U. S. 290, 294; *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 181.) It is difficult to understand why this rule well established in commerce cases should have been disregarded in this more important field. So remarkable a change of position, we submit, requires further consideration.

An examination of the majority opinion, moreover, discloses certain misconceptions concerning the problem here presented which may, perhaps, explain the result. Thus

at pages 8 and 9 of the slip opinion there is reference to the right of the states to regulate the time, place and method of distribution of opinion. We respectfully submit that this discussion has no place in these cases. No attempt was made by any of the municipalities involved to regulate the manner of distribution. There is here no limitation of the hours during which distribution might be conducted, nor with regard to the portions of the city in which it might take place. No attempt was made by the State courts to justify these ordinances on the ground that they constituted regulations.

The next misconception which appears in the opinion of the majority is that the operations here taxed are "incidental" to the exercise of the freedoms protected by the Constitution (slip opinion, p. 9) and that petitioners used "ordinary commercial methods" to raise propaganda funds (p. 10). These statements would be true if petitioners had been selling articles of commerce for the purpose of securing funds for their religious or educational activities. We would not, however, then be here. But the material which was distributed in these cases, and for which a price or a contribution was asked, was not "incidental" to the religious or educational activities of Jehovah's witnesses. It was an integral part of their activities. For it was the essential nature of their activities that their views should be distributed as widely as possible. The pamphlets distributed consisted only of the views. They *were* the propaganda. They were not sold by ordinary salesmen, but by converts seeking to spread their views. Money was asked not to raise funds for the purpose of spreading propaganda elsewhere, but because the task of spreading the propaganda then and there required some financial assistance. Moreover, in view of the undisputed fact that the leaflets were offered free to all persons unable to pay, it is apparent that the essential objective of the distribution was to spread the ideas, not to raise money.

The essential position taken by petitioners is not that they are exempt from all taxation because engaged in religious activities, or in the distribution of ideas. They do not contend—and we certainly would not support them in any such contention—that the property employed by the organization or the individuals in such religious or other propaganda activities would be entitled to exemption from non-discriminatory taxation on constitutional grounds, although the property of the organization is universally exempted from taxation by legislative enactment. The difference, however, between ordinary ad valorem property taxes and general income taxes and a flat license tax is that the former fall but incidentally upon the exercise of the functions protected by the constitution, while the latter is a direct and immediate burden upon the exercise of such functions. It is of the same category as the gross income tax and the stamp tax and, like these, should be held unconstitutional when imposed on constitutionally protected functions.

We respectfully submit, therefore, that the view expressed (p. 10) that these transactions were commercial rather than religious or educational is without support in the evidence. We are not dealing here with any attempt to evade compliance with a regulation properly applicable to a commercial transaction by linking it up with a non-commercial activity, as was done in the *Chrestensen* case. Here each and every part of the transaction was non-commercial. The circumstance that money passed cannot alter the essential nature of the activities of these petitioners and appellant.

We suggest also that the statement of the Court (p. 10) that the Constitution does not distinguish between various kinds of taxes, while true, is both irrelevant and misleading. For this Court has not hesitated to strike down taxes on various grounds though the Constitution says nothing about them at all. Thus this Court has continuously refused to permit taxation unless there was jurisdiction to

tax²—and the recent decision in *Tax Commission v. Aldrich* (86 Law. Ed. Adv. 911) certainly did not reject that doctrine. Moreover, this Court has, though with considerable variation in application, likewise struck down state taxes on federal instrumentalities and federal taxes on state instrumentalities, although there is no language in the Constitution which requires that result. And again the recent decisions restricting the application of this doctrine (such as *Graves v. New York*, 306 U. S. 466—Cf. *Standard Oil Co. v. Johnson*, 86 Law. Ed. Adv. 1063) have not rejected the fundamental principle. Moreover, at least in commerce cases, there still is a difference in treatment between gross income taxes and net income taxes (See *McGoldrick v. Berwind-White Coal Company*, 309 U. S. 33, 45, note 2).

The truth of the matter is that this Court has endeavored to pass on the validity of taxes by judging the effect of those taxes, even though the Constitution itself may have in it no language which directly touches the particular form of tax. So in the cases at bar it is not the particular form of the taxes which is important, but the effect of these taxes upon the privileges of freedom of speech, of the press and of religion guaranteed by the Constitution against interference by any state.

That the decision of the Court will have far-reaching and disastrous consequences can hardly be denied. While the amounts of the taxes were not challenged in the particular cases before the Court, in the belief that no such challenge was necessary in view of the nature of the ordinances, it can hardly be denied that the amounts are substantial and burdensome. If the opinion of this Court stands then all unpopular minority groups will be confronted with the necessity of challenging, in each instance, the reasonableness of the amount of the license fee exacted by each particular municipality. Until a number of these cases shall have reached this Court no one will know what standard will be applied. The litigation which will ensue will necessarily create a tremendous burden on all such groups. It

may indeed by itself result in a practical denial of freedom of distribution.

Moreover, while, in particular cases, the fee charged may ultimately be held to have been reasonable, it is fallacious to suppose, as does the majority opinion (p. 11), that the multiplication of such charges throughout the country will not impose an undue burden. It can hardly be supposed that in all communities the money received from the distribution will pay the amount of the tax imposed. Deficits will, therefore, arise which will multiply as the number of municipalities exacting such fees increases. The "enlarged field of distribution" will then be wholly illusory, resulting merely in a cumulative increase in financial burden. This is not a situation in any way analogous to the *Coverdale* case (303 U. S. 604) cited by the Court. The tax there was laid on the privilege of operating certain engines for the purpose of increasing pressure in a pipe line. It was held not to be a tax on interstate commerce because non-discriminatory. Nothing was said in that case about an enlarged field of distribution. Moreover there is an essential difference between the spread of commerce and the dissemination of ideas. The very safety of the country may depend on wide-spread information and education, often provided only by volunteers who must be financed as they go along.

Two other considerations indicate the basic unsoundness of the majority opinion. In the first place, it is evident that ordinances of this kind lend themselves to discrimination in enforcement (Cf. *Thornhill v. Alabama*, 310 U. S. 88). So long as they are confined to purely commercial matters there is little likelihood of such discrimination—or at least it can be taken care of in ordinary ways. However, when such licenses can be imposed on persons exercising political or religious functions, then it is practically certain that discrimination will result, that unpopular groups will be harassed for not having paid the tax and popular ones never required to pay it. The burden

will then be imposed upon the representatives of these unpopular groups to prove this discrimination, a burden difficult to sustain, and one which should never be imposed upon them in the first place.

Finally, the decision rendered opens wide the door to the harassing of unpopular groups by dubious testimony. If these groups now abandon their previous habit of requesting contributions in connection with the distribution of literature, it is safe to predict that their representatives will be arrested throughout the country on the charge that they did request a contribution. In the vital field of freedom of ideas, no such consequences should be possible. They could all be avoided by a realistic approach by this Court, by a recognition that the attempt to apply the ordinances to these cases was motivated, not by a desire to regulate the use of the streets, not by a desire to exact payments for services rendered, but in an attempt to interfere with an unpopular group in its desire to express its ideas. This Court should resolutely set its face against any such attempt, no matter what the form or the device may be.

Surely the views expressed in the opinions of the Chief Justice and of Mr. Justice Murphy are more consonant with the high standard which this Court has in recent years reached in the field of civil liberties than are the views of the majority. We respectfully urge that this Court reconsider this decision which, if not reconsidered, will some day be recognized as the most unfortunate recently rendered by the Court.

Respectfully submitted;

AMERICAN CIVIL LIBERTIES UNION

as Amicus Curiae

OSMOND K. FRAENKEL,
of Counsel.

Office - Supreme Court, U. S.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED
OCTOBER TERM, 1942

Nos. 280, 314 and 966

ROSCO JONES,

Petitioner,

vs.

CITY OF OPELIKA;

LOIS BOWDEN AND ZADA SANDERS,

Petitioners,

vs.

CITY OF FORT SMITH, ARKANSAS;

CHARLES JOBIN,

Appellant,

vs.

STATE OF ARIZONA.

**BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS
ASSOCIATION AS AMICUS CURIAE.**

AMERICAN NEWSPAPER PUBLISHERS
ASSOCIATION,

Amicus Curiae,

By ELISHA HANSON,

Counsel for Amicus Curiae.

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SUPREME COURT OF THE UNITED STATES
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BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE.

This brief is submitted by the American Newspaper Publishers Association as Amicus Curiae in the above entitled causes in support of the petitioners' joint motion for rehearing.¹

¹ For convenience the moving parties herein are collectively referred to as petitioners.

Statement of the Case.

In the interest of brevity the Amicus Curiae accepts the statements of the cases as set forth in the briefs of petitioners before this Court by writs of certiorari in Nos. 280 and 314 and by appeal in No. 966. It also relies upon the statements of fact in the dissenting opinion of Mr. Chief Justice Stone and Justices Black, Douglas and Murphy rendered in these cases on June 8, 1942.

Interest of the Amicus Curiae.

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Membership in the Association is confined to publishers of daily and/or Sunday newspapers. This membership embraces more than 425 newspaper publishers whose publications represent in excess of 80% of the total daily and Sunday circulation of newspapers published in the United States.

The Amicus Curiae files this brief because it believes that the majority opinion in the cases herein establishes a dangerous precedent for licensing the press by legislative devices which resurrect the evils the First Amendment was intended forever to remove.

Among the functions of the daily newspaper press is the gathering and dissemination of information in the form of news, editorial comment and advertising.

News is factual information concerning matters of public importance that in the judgment of the editor is of sufficient general interest to warrant its publication.

Editorial comment is discussion of such matters from the analytical or critical viewpoint. It includes expression of opinion.

Advertising is information concerning the goods, services or ideas of one who is willing to pay to have that information disseminated through the press.

The Amicus Curiae submits that the judgments of conviction affirmed by this Court violate the rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Constitutional Provisions Involved.

The First Amendment to the Constitution of the United States is as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The pertinent portion of the Fourteenth Amendment to the Constitution of the United States is as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Argument.

The First and Fourteenth Amendments Deny to the Legislature the Power to License the Publication or Circulation of Information or Ideas Through the Press or Other Media.

The issue in this proceeding is whether under our Constitution the legislature has the power to require a license as a condition precedent to the exercise of the rights guaranteed by the First Amendment and protected by the Fourteenth Amendment against invasion by the states.

No such power exists. If it does exist, then the historic struggle which culminated in the adoption of the First Amendment—indeed, in the entire Bill of Rights—was all in vain.

Nothing has been made plainer in prior decisions of this Court than that the First Amendment resulted from a long history of resistance of the press to the twin evils of censorship through licensing of the press and the notorious "taxes on knowledge" in the form of stamp taxes on the circulation and taxes on advertising matter of newspapers.

This Court has recorded that history in numerous decisions, notably in *Near v. Minnesota*, 283 U. S. 697 (1931), *Grosjean v. American Press Co.*, 297 U. S. 233 (1936) and *Bridges v. California*, *Times-Mirror Co. v. Superior Court*, 62 Sup. Ct. 190 (1941). From that historical background has emerged the fundamental interpretation that the First Amendment is a grant of immunity from every conceivable form of abridgment of a free press, whether it be a previous restraint upon publication or a restraint upon circulation subsequent to publication. And to remove any doubt concerning the extent of this protection this Court recently declared that

"the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society." (*Bridges v. California*, *Times-Mirror Co. v. Superior Court*, *supra* at page 195.)

Neither logical distinctions nor professed needs for revenue can change the character of the license taxes in the present cases as conditions precedent to the exercise of the right to distribute printed information. Whether the tax be called a license tax, a privilege tax, an occupation tax, a business tax or a fee, any tax or other exaction which falls directly upon the act of circulation is an unconstitutional restraint upon the liberty of the press. It is the old stamp tax in another and more evil guise. Merely

characterizing the tax as a tax for revenue only will not change its nature and effect.

The issue in this proceeding becomes confused unless a careful distinction is made between ordinary taxes and license taxes. When a tax must be paid to secure a license for doing certain acts the acts done are illegal unless the license is obtained. This can only mean that a license tax creates a condition precedent to the right to engage in a given activity. And if the statute further provides for revocation of the license in certain circumstances it also means that there may be a condition subsequent which prevents continuance of the given activity.

No agency of the government can impose such conditions upon the exercise of the rights conferred by the First Amendment.

It is immaterial whether the license issues as a matter of course or whether its issuance or revocation is at the uncontrollable discretion of an administrative official. The requirement of a license is in itself a clog upon the press.

The question involved is the *existence* of such power and not its reasonable exercise. Whether the license tax professes to be for revenue purposes or for regulatory purposes the First Amendment removes from the sphere of taxable subject matter any tax which constitutes a restraint upon the acts of publication or circulation—in short, upon any of the functions of the press. There is no power to compel a publisher to choose between taking a license or refraining from the activity of publication or dissemination.

The license taxes sustained in these cases operate as conditions precedent which must be met before the act of circulation can be exercised at all. Hence the license taxes regulate one important function of the press. And if such regulation is valid all the functions of the press can be thus regulated.

Merely to state this consequence is to demonstrate that neither the states nor Congress has the power so to regulate the press.

The hazards to which the press may be exposed as a result of the upholding of the license taxes in the instant cases are readily perceived. If the legislature can require a license as a condition precedent to the circulation of press information it can impose an identical license as a condition to engaging in the newspaper publishing business. It can then impose heavy fines and penalties for non-payment of the license fee and enjoin publication or distribution until the fee is paid. If the state has such power it can make the conditions of the license whatsoever it wills, to the extent, for instance, that only a few newspapers can perform the functions of the press, or even to such an extent that none can perform those functions at all.

Once it is decided that a license tax can be laid upon the right to publish or to disseminate printed matter then there is no limit to this power short of complete control or suppression of the press. Prior decisions of this Court have repeatedly pointed out that when the subject matter is brought within the taxing power of a state or municipality the legislature may then fix the rate of the tax and thereby control or destroy the activity taxed. *Magnano Co. v. Hamilton*, 292 U. S. 40 (1934); *Grosjean v. American Press Co.*, *supra*. Where the power to regulate exists there may be no limit to its exercise within the discretion of the state. For if the power exists at all the oppressiveness of the burden upon those burdened cannot interdict the regulation. *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550 (1935).

The mere enumeration of these hazards conclusively shows that the First Amendment prohibits regulation of the press by any sort of restraint, whether it be by licensing, taxation or otherwise.

History records that the Constitution originally did not contain a Bill of Rights and that there was a controversy between the Federalists, who advocated ratification of the Constitution as it then stood, and the Republicans, who demanded a Bill of Rights as a condition to the ratification of the Constitution. One fact that stands out above all others is that both sides in the controversy were convinced that freedom of the press should not be infringed through governmental regulation of any sort, kind or description. The controversy was over the method of protecting the principle and not over the principle itself. See Ford, Pamphlets on the Constitution of the United States, 1787-1788, pp. 113, 156-157, 316 (1888); Pennsylvania and the Federal Constitution (McMaster and Stone, Eds.), pp. 180, 181, 576 ff. (1888); Stevens, Sources of the Constitution of the United States, pp. 213, 218, 221 (1894).

So the Founding Fathers determined that the public good required that the press shall not be subject to regulation or control by any agency of government. The First Amendment places freedom of the press in a preferred position, as Mr. Chief Justice Stone has pointed out. 62 Sup. Ct. at page 1244. The press is not an ordinary private business that is subject to licensing or control. It is not like a public utility that can be required to take out a license or obtain a certificate of convenience and necessity or procure a charter with special limitations before it can operate.

The very fact of licensing to engage or continue in the business of publishing or circulating newspapers destroys the independence of the press. When regulation enters the door, independence flies out the window. From that moment practically every activity of the press may be regulated.

If the state has the power to license or regulate the press then it can determine who might or might not engage or continue in the newspaper publishing business and limit the extent of their activities therein; where and when a

newspaper might circulate; how many copies it might distribute; what it should or should not publish; who might or might not advertise in it; what it should charge for its publications; what it should charge its advertisers for the services rendered therein. Under a power to license or regulate the press the legislature can also claim the power to classify the press for regulatory purposes on the basis of such factors as the volume of circulation, frequency of issue and area of distribution. If there is power to impose license taxes as a price for carrying on the operations of the press then there is nothing to prevent the legislature from declaring that the business of publishing newspapers is a business to be licensed. And if it can so declare it can also license the preacher of the gospel and can limit those who can preach to the destruction of freedom of religion as guaranteed by the First Amendment.

All such invasions of the liberty of the press are plainly prohibited by the unequivocal and broad commands of the First Amendment.

The subtle encroachments upon the freedom of the press to which the majority opinion in the present case lends support make it imperative that misconceptions attributable to a dictum of this Court in *Associated Press v. NLRB*, 301 U. S. 103, 132 (1937)² be cleared away.

This *Amicus Curiae* has previously conceded before this Court,³ and repeats here, that newspapers are not immune from certain general laws. For example, the press is answerable for abuses to which the general law of libel applies.

² "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and non-discriminatory taxes on his business."

³ Brief of the American Newspaper Publishers Association as *Amicus Curiae*, *Times-Mirror Co. v. Superior Court*, No. 64, United States Supreme Court, October Term, 1940.

Similarly, newspapers are not immune from the ordinary forms of taxation. Newspapers pay a large number of different taxes, among which are federal and state income taxes, federal capital stock taxes, federal social security taxes, corporate franchise taxes, real and personal property taxes and unemployment compensation taxes. But none of these taxes, as distinguished from the license taxes in the present cases, has a prohibitory or censorial quality or operates as a condition precedent to the publication or circulation of newspapers.

The Amicus Curiae subscribes fully to the proposition of Mr. Chief Justice Stone that the commands of the First and Fourteenth Amendments as applied to the press extend at least to every form of taxation which, because it is a condition of the exercise of the right of publication and circulation, is capable of being used to suppress or control such activities. 62 Sup. Ct. at page 1244.

License taxes on the operations of the press fall within the proscribed category. Such taxes are not ordinary forms of taxation which merely take money out of the pockets of the publisher, as in the case of taxes heretofore mentioned. License taxes have a prohibitory or censorial quality either on their face or in the potentialities of their administration.

Because license taxes condition the exercise of the right to publish and to disseminate the publication their validity does not depend upon the small size or amount of the tax. Whether for revenue or for regulatory purposes the small price for a license of today may become the entering wedge for the large price of a license tomorrow once it is held that what is taxed is within the power of the state. The character and effect and not the amount of the tax is the decisive factor. In the light of the long history of misuse of license taxes as weapons of censorship and suppression of ideas any tax upon publication or circulation of printed informa-

tion invades the constitutional guaranty. What the Founding Fathers feared above all was any form of tax which created a restraint either by reason of a prohibitory or censorial tendency prior to publication or as a deterrent to distribution of the publication. Even taxes on circulation for purely revenue purposes were deemed obnoxious to a free press. 62 Sup. Ct. at page 1248.

Misconceptions have also arisen concerning the scope of the holding in *Grosjean v. American Press Co.*, *supra*. In that case the State of Louisiana placed a tax upon the advertising revenue of newspapers and magazines with a circulation in excess of 20,000 copies a week. This Court was unanimous in holding that such a tax was an unconstitutional restraint upon the press in a double sense. First, its effect was to curtail the amount of revenue realized from advertising, thereby affecting the service of the press, and, second, its direct tendency was to restrict circulation.

The rationale of the *Grosjean* case was not rested upon the fact that a selected group of newspapers was singled out for attack by the notorious Huey Long administration then in power in the state. The *Grosjean* case condemns every form of restraint upon the circulation of newspapers in recognition of the fact that liberty of circulation is the very life blood of the press and that every newspaper depends upon advertising revenue to meet the major part of its cost of production. Decreased revenue resulting from taxes on newspaper advertising therefore seriously impairs the operations of the press.

The fact that the tax in the *Grosjean* case was one with a long history of hostile misuse against the freedom of the press simply made the purpose to suppress circulation very plain. But, as Mr. Chief Justice Stone pointed out in the present cases, the First Amendment is not confined to safeguarding the freedoms therein against discriminatory action of the state or to cases where the protected privilege is

sought-out for attack. Any tax which fetters the press is unconstitutional, as Mr. Justice Sutherland's review of the history of the First Amendment in the *Grosjean* case conclusively demonstrates.

The Amicus Curiae submits that this Court should reconsider and clarify the effect of its decision in *Giragi v. Moore*, 301 U. S. 670 (1937). In that case the State of Arizona levied a tax of one per cent upon the gross receipts of various businesses in the state, including the newspaper publishing business, and required every person engaged in a business subject to such tax to obtain a license or else suffer fines and penalties.

An examination of the record in the *Giragi* case will show that the contention that the tax there involved was in violation of the Fourteenth Amendment was first raised on motion for rehearing before the Supreme Court of Arizona. Until that motion for rehearing no federal question had been raised. Consequently, when the record came before this Court on appeal, it was deficient in failing adequately to show in what respects the tax constituted a restraint upon the press.

This Court therefore dismissed the appeal in a per curiam decision for want of a substantial federal question. *Giragi v. Moore, supra*. But the matter was disposed of on a jurisdictional statement only and the per curiam decision was not accompanied by an opinion explaining the relation of *Grosjean v. American Press Co., supra* and *Associated Press v. NLRB, supra* to the issue involved. The Amicus Curiae therefore believes that the true character and effect of a tax such as that in the *Giragi* case has never been fully considered by this Court.

Nor was the true character and effect of the tax fully considered in *Arizona Publishing Co. v. O'Neil*, 304 U. S. 543 (1938), where this Court on appeal affirmed the judgment of the District Court of the United States for the District

of Arizona upholding the same tax statute as in the *Giragi* case. This case was also decided on the jurisdictional statement and in a *per curiam* decision which needs clarification.

Since the *Giragi* and *Arizona Publishing Company* decisions this Court has made it plain in *Lovell v. Griffin*, 303 U. S. 444 (1938), that the First Amendment safeguards liberty of circulation as well as liberty of publication. The *Amicus Curiae* believes that in the light of the *Lovell* and subsequent cases the statute in the Arizona cases was as clear a violation of the freedom of the press as are the ordinances in the present cases. All of them are license taxes which have the common vice of a condition precedent to the exercise of the right to publish or to distribute.

The question of whether a state may enact regulations for police protection relating to the safety, morals or good order of the community may be laid aside. That is not an issue herein. Even if that question were involved, this Court, as on other occasions, would carefully scrutinize the professed purpose of police protection to see whether in reality it is a purpose to restrain the publication or distribution of information and opinion. In the present cases, even if a regulatory purpose were claimed, the license taxes would still fall directly upon the dissemination of ideas and hence would be repugnant to the First Amendment.

Detractors of a free press sometimes argue that the publishers of newspapers and magazines are not guaranteed special privileges by the First Amendment. Publishers have never claimed special privileges for themselves. As Mr. Chief Justice Stone has said, the First and Fourteenth Amendments place the freedoms of religion, press and speech "in a preferred position". In the case of the press its functions, as described in the beginning of this brief, fulfill a historic objective of the discovery and diffusion of knowledge. Freedom of the press is the right of the people to have information of vital public importance free from

censorship, restraint or control of those in authority. So when publishers are constantly on guard to challenge any impairment of a free press they are not seeking special privileges for themselves or for any class of persons. Rather they are discharging their solemn responsibility as trustees of the right of all the people to open channels of inquiry and discussion on matters of public importance.

If immunity from licensing of the press by taxation is labelled "special privilege" then the very immunity granted by the First Amendment is assailed.

Conclusion.

It is respectfully submitted that the joint motion for rehearing herein be granted and that on the rehearing the judgments of conviction be reversed.

Respectfully submitted,

AMERICAN NEWSPAPER PUBLISHERS
ASSOCIATION,

Amicus Curiae,

By ELISHA HANSON,

Counsel for Amicus Curiae.

MAR 4 1943

CHARLES ELMORE CRISLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Nos. 280, 314 and 966

ROSCO JONES,

vs.

Petitioner,

CITY OF OPELIKA;

LOIS BOWDEN AND ZADA SANDERS,

vs.

Petitioners,

CITY OF FORT SMITH, ARKANSAS;

CHARLES JOBIN,

vs.

Appellant,

STATE OF ARIZONA.

BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS
ASSOCIATION AS AMICUS CURIAE.

AMERICAN NEWSPAPER PUBLISHERS
ASSOCIATION,

Amicus Curiae,

By ELISHA HANSON,

Counsel for Amicus Curiae.

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BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE.

This brief is submitted by the American Newspaper Publishers Association as Amicus Curiae in the above entitled causes in support of petitioners¹ herein.

¹ For convenience petitioners and appellant are collectively referred to as petitioners.

Statement of the Case.

In the interest of brevity the Amicus Curiae accepts the statements of the cases as set forth in the briefs of petitioners before this Court by writs of certiorari in Nos. 280 and 314 and by appeal in No. 966. It also relies upon the statements of fact in the opinions of this Court rendered in these cases on the first argument. 316 U. S. 584 (1942).

Interest of the Amicus Curiae.

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Membership in the Association is confined to publishers of daily and/or Sunday newspapers. This membership embraces more than 425 newspaper publishers whose publications represent in excess of 80% of the total daily and Sunday circulation of newspapers published in the United States.

Among the functions of the daily newspaper press is the gathering and dissemination of information in the form of news, editorial comment and advertising.

News is factual information concerning matters of public importance that in the judgment of the editor is of sufficient general interest to warrant its publication.

Editorial comment is discussion of such matters from the analytical or critical viewpoint. It includes expression of opinion.

Advertising is information concerning the goods, services or ideas of one who is willing to pay to have that information disseminated through the press.

The Amicus Curiae files this brief because it believes that the license taxes in the cases herein establish a dangerous precedent for licensing the press by legislative devices which resurrect the evils the First Amendment was intended forever to remove.

The Amicus Curiae submits that the judgments of conviction below violate the rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States.

Constitutional Provisions Involved.

The First Amendment to the Constitution of the United States is as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The pertinent portion of the Fourteenth Amendment to the Constitution of the United States is as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ARGUMENT.

The First and Fourteenth Amendments deny to the legislature the power to license or to tax the publication or circulation of information or ideas through the press or other media.

The issue in the cases before this Court is whether under our Constitution the legislature has the power to require a license as a condition precedent to the exercise of the rights guaranteed by the First Amendment and protected by the Fourteenth Amendment against invasion by the states. See *Near v. Minnesota*, 283 U. S. 697 (1931).

No such power exists. If it does exist, then the historic struggle which culminated in the adoption of the First Amendment—indeed, in the entire Bill of Rights—was all in vain.

All three ordinances in controversy not only make the taking out of a license mandatory but also require the payment of a license fee or privilege tax. Whether this dual requirement is considered separately or together, it still remains true that a municipality is forbidden by the Constitution to compel a license or a payment of a tax or both as a condition precedent to the dissemination of information and opinion in any form.

If the flat license taxes in these cases are sustained, then a way has been found effectively to curtail or even to prohibit the spreading of views on matters of public importance.

Historical Background of Controversy.

Nothing has been made plainer in prior decisions of this Court than that the First Amendment resulted from a long history of resistance of the press to the twin evils of censorship through licensing of the press and the notorious "taxes on knowledge" in the form of stamp taxes on the circulation and taxes on advertising matter of newspapers, periodicals and pamphlets.

This Court has recorded that history in numerous decisions; notably in *Near v. Minnesota*, 283 U. S. 697 (1931); *Grosjean v. American Press Co.*, 297 U. S. 233 (1936), and *Bridges v. California*, *Times-Mirror Co. v. Superior Court*, 314 U. S. 252 (1941).

In the *Grosjean* case it was recounted how licensing was used at first in England and then in the American colonies to control the press by a system of censorship. In the wake of the last English licensing Act in 1694 came the "taxes on knowledge". These found their counterpart in America in

the Stamp Acts. The storm of protest of the colonists against these devices of suppression was directly responsible for the insistence upon specific guaranties of freedom of religion, of speech and of the press in the First Amendment. As Mr. Chief Justice Hughes declared in *Lovell v. Griffin*, 303 U. S. 444, at page 451 (1938):

“The struggle for the freedom of the press was primarily directed against the power of the licenser. It was against that power that John Milton directed his assault by his ‘Appeal for the Liberty of Unlicensed Printing’. And the liberty of the press became initially a right to publish ‘without a license what formerly could be published only with one.’ While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision.”

History further discloses that the Constitution originally did not contain a Bill of Rights and that there was a controversy between the Federalists, who advocated ratification of the Constitution as it then stood, and the Republicans, who demanded a Bill of Rights as a condition to the ratification of the Constitution. One fact that stands out above all others is that both sides in the controversy were convinced that freedom of the press should not be infringed through governmental regulation of any sort, kind or description. The controversy was over the method of protecting the principle and not over the principle itself. See Ford, Pamphlets on the Constitution of the United States, 1787-1788, pp. 113, 156-157, 316 (1888); Pennsylvania and the Federal Constitution (McMaster and Stone, Eds.), pp. 180, 181, 576 ff. (1888); Stetens, Sources of the Constitution of the United States, pp. 213, 218, 221 (1894).

From that historical background has emerged the fundamental interpretation that the First Amendment is a grant

of immunity from every conceivable form of abridgment of a free press, whether it be a previous restraint upon publication or a restraint upon circulation subsequent to publication. *Near v. Minnesota, supra; Lovell v. Griffin, supra; Schneider v. State*, 308 U. S. 147 (1939). And to remove any doubt concerning the extent of this protection this Court recently declared that

“the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.” (*Bridges v. California, Times-Mirror Co. v. Superior Court, supra*, at page 265.)

Tested by the foregoing genesis and interpretation of the First Amendment, which the Fourteenth Amendment makes applicable to the states, each of the ordinances in the present cases is *on its face* an unconstitutional restraint upon the freedom of the press. As Mr. Chief Justice Stone has declared:

“For on its face a flat license tax restrains in advance the freedom taxed and tends inevitably to suppress its exercise. The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws.” (316 U. S. at page 609.)

When a tax must be paid to secure a license for doing certain acts the acts done are illegal unless the license is obtained. That can only mean that a license tax creates a condition precedent to the right to engage in a given activity. Precisely that situation is presented in the cases before this Court. The license taxes herein by their very nature constitute conditions precedent to the exercise of the right to distribute printed information.

Power to License Prohibited.

No agency of government can impose such conditions upon the press. The First and Fourteenth Amendments deny power to compel a publisher to choose between taking a license or refraining from the activity of publication and dissemination. The requirement of a license is in itself an impediment upon the press. It subjects to regulatory control the essential functions of publication and circulation. If such regulation is valid all the functions of the press can be thus regulated. The imposition of restraints of that character upon the press revive the evils at which the First Amendment was directed.

Whether the tax be called a license tax, a privilege tax, an occupation tax, a business tax or a fee; any tax or other exaction which falls directly upon the act of circulation is an invasion of the liberty of the press. It is the old stamp tax in another and more evil guise.

The question involved in these cases is the *existence* of the power to burden the press by laying license taxes upon the distribution of printed information—not the reasonable exercise of the power to tax. It is respectfully submitted that there is no such power.

No tenable distinction can be rested upon the mode of issuance of the license or the terms upon which a license may be denied or revoked. It is immaterial whether the license issues as a matter of course or whether its issuance is governed by specific standards or is at the uncontrollable discretion of an administrative official.

The same considerations apply to revocation of the license since revocation under any circumstances creates a condition subsequent to the continuance of dissemination of printed information. This is just as effective a clog upon the press as a condition precedent which sets up a barrier

to entry into the publishing field. None of the foregoing distinctions can change the character of the license taxes herein as unconstitutional restrictions upon the functions of the press.

Since each of the ordinances in question is void on its face the issue of constitutionality is presented irrespective of whether a person within the terms of the ordinances applies for a license. *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *Lovell v. Griffin, supra*. Concerning an ordinance invalid on its face Mr. Chief Justice Stone has observed:

"The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands". (316 U. S. at page 602.)

✓ Prior decisions irrefutably establish that this Court will test the statute on its face and weigh the likelihood of unconstitutional application or operation beyond the facts of the particular case before it. *Smith v. Cahoon*, 283 U. S. 553 (1931). In *Thornhill v. Alabama*, 310 U. S. 88 (1940), at page 97, the principle was stated as follows:

"Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas". (Emphasis supplied.)

So here it is appropriate to consider the hazards to which the press may be exposed as a result of the upholding of the license taxes in the instant cases. If the legislature can require a license as a condition precedent to the circulation of press information it can impose an identical license as a condition to engaging in the newspaper publishing business. It can then impose heavy fines and penalties for non-payment of the license fee and enjoin publication or distribution until the fee is paid. If the state has such power it can make

the conditions of the license whatsoever it wills, to the extent, for instance, that only a few newspapers can perform the functions of the press, or even to such an extent that none can perform those functions at all.

The Founding Fathers determined that the public good required that the press shall not be subject to regulation or control by any agency of government. The First Amendment places freedom of the press in a preferred position, as Mr. Chief Justice Stone has pointed out. 316 U. S. at 608. The press is not an ordinary private business that is subject to licensing or control. It is not like a public utility that can be required to take out a license or obtain a certificate of convenience and necessity or procure a charter with special limitations before it can operate. Nor can the immunity of the First Amendment be destroyed by classifying the press in a licensing statute along with businesses whose functions are not like those of the press.

To License is to Destroy One's Freedom.

The very fact of licensing to engage or continue in the business of publishing or circulating newspapers destroys the independence of the press. When regulation enters the door, independence flies out the window. From that moment practically every activity of the press may be regulated.

If the state has the power to license or regulate the press then it can determine who might or might not engage or continue in the newspaper publishing business and limit the extent of their activities therein; where and when a newspaper might circulate; how many copies it might distribute; what it should or should not publish; who might or might not advertise in it; what it should charge for its publications; what it should charge its advertisers for the services rendered therein. Under a power to license or regulate the press the legislature can also claim the power

to classify the press for regulatory purposes on the basis of such factors as the volume of circulation, frequency of issue and area of distribution. If there is power to impose license taxes as a price for carrying on the operations of the press, then there is nothing to prevent the legislature from declaring that the business of publishing newspapers is a business to be licensed. And if it can so declare it can also license the preacher of the gospel and can limit those who can preach to the destruction of freedom of religion as guaranteed by the First Amendment.

All such invasions of the liberty of the press and of religion are plainly prohibited by the unequivocal and broad commands of the First Amendment addressed to the states through the Fourteenth Amendment.

A License Tax is Not an Ordinary Tax.

The issue in these cases becomes confused unless a careful distinction is made between license taxes and ordinary taxes. In this connection it is imperative that misconceptions, attributable to a dictum of this Court in *Associated Press v. NLRB*, 301 U. S. 103, 132 (1937),² be disposed of.

The Amicus Curiae has previously conceded before this Court,³ and repeats here, that newspapers are not immune from certain general laws. For example, the press is answerable for abuses to which the general law of libel applies. Similarly, newspapers are not immune from the ordinary

² "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the anti-trust laws. Like others he must pay equitable and non-discriminatory taxes on his business."

³ Brief of the American Newspaper Publishers Association as Amicus Curiae, *Times-Mirror Co. v. Superior Court*, No. 64, United States Supreme Court, October Term, 1940.

forms of taxation. Newspapers pay a large number of different taxes, among which are federal and state income taxes, federal capital stock taxes, federal social security taxes, corporate franchise taxes, real and personal property taxes and unemployment compensation taxes. Such taxes are laid to support the government and, of course, may operate to increase the cost of doing business. Cf. *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250 (1938). They also provide adequate sources of revenue to satisfy the needs of government, so that there is no necessity to resort to taxes which seriously hinder the functions of the press. But none of the foregoing taxes, as distinguished from the license taxes in the present cases, has a prohibitory or censorial quality or operates as a condition precedent to the publication or circulation of newspapers.

The Amicus Curiae subscribes fully to the propositions of Mr. Chief Justice Stone that the commands of the First and Fourteenth Amendments as applied to the press extend at least to every form of taxation which, because it is a condition of the exercise of the right of publication and circulation, is capable of being used to control or suppress such activities. 316 U. S. at page 608. Only by the application of this principle can this Court reconcile the power to levy ordinary taxes for the support of government with the constitutional limitations in the First and Fourteenth Amendments.

License taxes on the operations of the press fall within the proscribed category. Such taxes are not ordinary forms of taxation which merely take money out of the pockets of the publisher, as in the case of taxes heretofore mentioned. License taxes have a prohibitory or censorial quality either on their face or in the potentialities of their administration.

The Power to Tax is the Power to Destroy.

Once it is decided that a license tax can be laid upon the right to publish or to disseminate printed matter then there is no limit to this power short of complete control or suppression of the press. The validity of such a license tax does not depend upon the small amount of the tax. Prior decisions of this Court have repeatedly pointed out that when "subject matter is brought within the taxing power of a state or municipality the legislature may then fix the rate of the tax and thereby control or destroy the activity taxed. *Magnano Co. v. Hamilton*, 292 U. S. 40 (1934); *Grosjean v. American Press Co.*, *supra*. Where the power to regulate exists there may be no limit to its exercise within the discretion of the state. For if the power exists at all the oppressiveness of the burden upon those burdened cannot interdict the regulation. *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550 (1935). Realistically considered, the taxes in these cases were prohibitive in effect. 316 U. S. at pages 604, 614.

Whether for revenue or for regulatory purposes the small price for a license of today may become the entering wedge for the large price of a license tomorrow. The character and effect and not the amount of the tax is the decisive factor. In the light of the long history of misuse of license taxes as weapons of censorship and suppression of ideas, any tax upon publication or circulation of printed information invades the constitutional guaranty. As Mr. Chief Justice Stone observed:

"In its potency as a prior restraint on publication the flat license tax falls short only of outright censorship or suppression". (316 U. S. at page 611.)

It must also not be overlooked that the sanctioning of the license taxes in the instant cases would open the way to multiple burdens by the imposition of similar taxes by

states or municipalities throughout the United States. The cumulative effect of such taxes would be as effective in destroying the free circulation of ideas as direct censorship. This Court has already safeguarded interstate commerce against burdensome multiple state license taxes. See *Gwinn, White & Prince v. Henneford*, 305 U. S. 434 (1939). Obviously, civil liberties should be even more zealously protected.

Nor does the characterization of a license tax as a tax for revenue only change or disguise its nature and effect. The English and American colonial taxes on the circulation of printed matter were purportedly designed for revenue; yet they were deemed obnoxious to a free press because they restrained the diffusion of ideas. 316 U. S. at pages 616-617.

None of the ordinances in controversy contain regulatory features related to the safety, morals or good order of the community. Moreover, there was no valid "police" end to which the regulation could be addressed. The literature was not of itself objectionable. Its dissemination was not accompanied by a breach of peace, an obstruction or littering of the streets, or a "clear and present danger" to organized society. See *Cox v. New Hampshire*, 312 U. S. 569 (1941). But even professed regulatory purposes will not save a licensing ordinance under which license taxes in reality fall directly on the exercise of the essential functions of the press.

Misconceptions have also arisen concerning the scope of the holding in *Grosjean v. American Press Co.*, *supra*. In that case the State of Louisiana placed a tax upon the advertising revenue of newspapers and magazines with a circulation in excess of 20,000 copies a week. This Court was unanimous in holding that such a tax was an unconstitutional restraint upon the press in a double sense. First, its effect was to curtail the amount of revenue realized

from advertising, thereby affecting the service of the press, and, second, its direct tendency was to restrict circulation.

The rationale of the *Grosjean* case was not rested upon the fact that a selected group of newspapers was singled out for attack by the notorious Huey Long administration then in power in the state. The *Grosjean* case condemns every form of restraint upon the circulation of newspapers in recognition of the fact that liberty of circulation is the very life blood of the press and that every newspaper depends upon advertising revenue to meet the major part of its cost of production. Decreased revenue resulting from taxes on newspaper advertising, therefore, seriously impairs the operations of the press.

The fact that the tax in the *Grosjean* case was one with a long history of hostile misuse against the freedom of the press simply made the purpose to suppress circulation very plain. But, as Mr. Chief Justice Stone has pointed out (316 U. S. at page 608), the First Amendment is not confined to safeguarding the freedoms therein against discriminatory action of the state or to cases where the protected privilege is sought out for attack. Any tax which fetters the press is unconstitutional, as Mr. Justice Sutherland's review of the history of the First Amendment in the *Grosjean* case conclusively demonstrates.

Giragi and Arizona Publishing Company Cases Require Reconsideration.

The Amicus Curiae further submits that this Court should reconsider and clarify the effect of its decision in *Giragi v. Moore*, 301 U. S. 670 (1937). In that case the State of Arizona levied a tax of one per cent upon the gross receipts of certain specified but not all businesses in the state. The statute covered the publication of newspapers and was interpreted to include the gross income

derived from the sale of advertisements and notices in such newspapers. It required every person engaged in a business subject to such tax to obtain a license or else suffer fines and penalties.

An examination of the record in the *Giragi* case will show that the contention that the tax there involved was in violation of the Fourteenth Amendment was first raised on motion for rehearing before the Supreme Court of Arizona. Until that motion for rehearing, no federal question had been raised. Consequently, when the record came before this Court on appeal, it was deficient in failing adequately to show in what respects the tax constituted an unconstitutional restraint upon the press.

This Court therefore dismissed the appeal in a per curiam decision for want of a substantial federal question. *Giragi v. Moore, supra*. But the matter was disposed of on a jurisdictional statement only and the per curiam decision was not accompanied by an opinion explaining the relation of *Grasjean v. American Press Co., supra*, and *Associated Press v. NLRB, supra*, to the issue involved. The Amicus Curiae therefore believes that the true character and effect of a tax such as that in the *Giragi* case has never been fully considered by this Court. When so considered a license tax of a percentage of the gross receipts of a newspaper will be found to be as destructive of unhindered performance of the functions of the press as are the flat license taxes in the present cases. If the legislature has the power to levy a gross receipts tax upon the press, then it has the power to increase the rate even to the extent of confiscating the entire gross income of the press. A tax upon the press measured by gross receipts may be a potent instrument to compel a publisher, particularly in the case of small newspapers, to suspend publication or else to publish at a loss.

Nor was the true character and effect of the Arizona gross receipts tax fully considered in *Arizona Publishing Co. v.*

O'Neil, 304 U. S. 543 (1938), where this Court on appeal affirmed the judgment of the District Court of the United States for the District of Arizona upholding the same tax statute as in the *Giragi* case. This case was also decided on the jurisdictional statement and in a per curiam decision which needs clarification.

Since the *Giragi* and *Arizona Publishing Company* decisions this Court has made it plain in *Lovell v. Griffin, supra*, that the First Amendment safeguards liberty of circulation as well as liberty of publication. The Amicus Curiae believes that in the light of the *Lovell* and subsequent cases the statute in the Arizona cases was as clear a violation of the freedom of the press as are the ordinances in the present cases. In such circumstances a gross receipts tax, in common with flat license taxes, has the vice of imposing a burden directly upon the activities of the press.

Detractors of a free press sometimes argue that the publishers of newspapers and magazines are not guaranteed special privileges by the First Amendment. As Mr. Chief Justice Stone has said, the First and Fourteenth Amendments place the freedoms of religion, press and speech "in a preferred position". 316 U. S. at page 608. In the case of the press its functions, as described in the beginning of this brief, fulfill a historic objective of the discovery and diffusion of knowledge. Freedom of the press is the right of the people to have information of vital public importance free from censorship, restraint or control of those in authority. So, when publishers are constantly on guard to challenge any impairment of a free press, they are not seeking special privileges for themselves or for any class of persons. Rather they are discharging their solemn responsibility as trustees of the right of all the people to open channels of inquiry and discussion on matters of public importance.

If immunity from licensing of the press by taxation is labelled "special privilege" then the very immunity granted by the First Amendment is assailed.

Conclusion.

It is respectfully submitted that the judgments of conviction below be reversed.

Respectfully submitted,

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION,

Amicus Curiae,

By ELISHA HANSON,

Counsel for Amicus Curiae.

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Nos. 280, 314 and 966

October Term, 1941

IN THE
SUPREME COURT OF THE UNITED STATES.

ROSCO JONES, *Petitioner*,

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CITY OF OPELIKA,

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THE STATE OF ARIZONA.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

ON MOTIONS FOR REHEARING

BRIEF ON BEHALF OF THE GENERAL CONFERENCE
OF SEVENTH-DAY ADVENTISTS AS AMICUS
CURIAE.

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IN THE
SUPREME COURT OF THE UNITED STATES

Nos. 280, 314 and 966

October Term, 1941.

ROSCO JONES, *Petitioner*,

v.

CITY OF OPELIKA.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE
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LOIS BOWDEN AND ZADA SANDERS, *Petitioners*,

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OF ARKANSAS.

CHARLES JOBIN, *Appellant*,

v.

THE STATE OF ARIZONA.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

ON MOTIONS FOR REHEARING

**BRIEF ON BEHALF OF THE GENERAL CONFERENCE
OF SEVENTH-DAY ADVENTISTS AS AMICUS
CURIAE.**

Since the legal issues in these cases have been completely argued, this brief will be confined to the facts as to the beliefs and evangelical methods of the Seventh-Day Adventist Denomination, and the deleterious effects of the present

decision. It will sketch, in short compass and with references to documentary material, the origin of the Denomination in early America, its tenets based upon a literal reading of the Bible, its primary mission work through the printed word, the religious nature and duty of the vending of Denominational literature, and the adverse operation of the present decision of this Court upon the essential methods of teaching and spreading the Gospel and hence upon the freedom of religion.

There have been filed herewith, as numbered exhibits, the Denomination's Annual Year Book for 1942 (Exhibit I), the most recent Statistical Reports of the Denomination and its General Conference (Exhibits II, III, and IV), the Financial Statement of the Seventh-Day Adventist Conferences (Exhibit V), the Colporteurs' Summary for North America for 1940-1941 (Exhibit VI), and a recent historical and anniversary number of one of the magazines of the Denomination (Exhibit VII).

I.

.History and Beliefs of the Seventh-Day Adventist Denomination.

The origins, beliefs, growth, organization, and activities of the Seventh-Day Adventist Denomination demonstrate its status as an entirely legitimate and orthodox religious movement.

A. Origins.—The roots of the Denomination are to be found in the time and place of the first settlements of New England, with its immediate organization in the religious revival at the beginning of the nineteenth century.¹

¹ Loughborough, *Rise and Progress of Seventh-Day Adventists* (Battle Creek, Michigan, 1892); Loughborough, *The Great Second Movement* (South Bend, Ind., 1905); Andross, *Story of the Advent Message* (Peekskill, N. Y., 1927); Olsen, *A History of the Origin and Progress of Seventh-Day Adventists* (Washington, D. C., 3d ed. 1932); Howell, *The Great Advent Movement* (Washington, D. C., 1935).

1. *Seventh-Day Baptists*.—Among the dissentient groups who first came to America were the Baptists, including those who observed the "Bible Sabbath" which fell on the Saturday of the Puritans. The first Sabbathkeeper came to America in 1664, forty-four years after the landing of the Pilgrims. They suffered the religious persecution of the time in New England. Three hundred years ago, Roger Williams, the founder of religious liberty in the New World, offered them haven in Rhode Island and championed their "most Scriptural" cause.² The Seventh-Day Movement thus became a part of the very birth of religious tolerance in America.³

2. *The Adventists*.—Early in the Nineteenth Century, the minds of religious men became particularly concerned with the prophecies of Divine revelation. Many of them, including men of prominence in both the Old World and the New, became enthusiastic converts to the view that the prophetic second coming of the Lord was at hand.⁴

² Longacre, Roger Williams—His Life, Work, and Ideals (Washington, D. C., 1939), 74-75, 87-88.

³ The Seventh-Day Baptists accepted Williams' invitation to Rhode Island, and one of them became governor. *Idem*, Williams was the first pastor of the first Baptist church of Providence, the Baptists carried their message of religious freedom to Anglican Virginia, and there Jefferson and Madison became their attorneys in their struggle for religious freedom. *Id.*, 100-101. Rhode Island refused to ratify the Constitution until assured, with the aid of Madison and Jefferson, that the declaration of tolerance in the Bill of Rights would be adopted. *Id.*, 183 *et seq.* As a minority group, the Seventh-Day Adventists, who succeeded the Seventh-Day Baptists, have always stressed the concept of separation of church and state, with complete liberty of conscience in spiritual matters.

⁴ The original leaders of the Adventist movement pointed to the prophecy in the book of Daniel, "And he said unto me, Unto two thousand and three hundred days; then shall the sanctuary be cleansed." Daniel 8: 14. These prophetic days they took to be literal years, beginning as they thought from the ninth chapter of Daniel at the going forth to restore and build Jerusalem in 457 B. C. The period would, therefore, end in the autumn of 1844 A. D. The uneventful passing of the year, of course, caused a decline in the numbers of Adventists and a revision of their beliefs. Accordingly, many Adventists adopted the view that the sanctuary

3. *The Seventh-Day Adventists.*—The faith of the Seventh-Day Adventists Denomination is, in essence, a uniting of the major beliefs of both the Adventists and the Seventh-Day Baptists. Adventists became convinced that the seventh day was the true Bible Sabbath and must be observed according to the Commandments, and the first Sabbath-keeping Adventist Church was formed at Washington, New Hampshire, in 1844.

B. Growth and Organization.—In 1861 the name “Seventh-Day Adventists” was formally adopted by the Denomination at Battle Creek, Michigan. In that year the first organizational plans were drawn for the State of Michigan. Two years later the first General Conference session was held and a world wide organization was planned.

The Organization as it exists today is as follows:

1. *The Church.*—A united body of individual believers holding the same faith and doctrines in common.

2. *The Local Conference.*—Or local mission field, which is a united body of churches in a state, province, or local territory.

3. *The Union Conference.*—Or union mission field, which is a united body of conferences or mission fields within a larger territory.

4. *The Division.*—A division or section of the General Conference, embracing local or union conferences or mission fields in large sections of the world field.

5. *The General Conference.*—The general body embracing the church in all parts of the world.

The organization of the Seventh-Day Adventist Church is representative in form. Every church member votes for

mentioned by Daniel was not this earth, but the temple of God in Heaven. The cleansing, therefore, of the Sanctuary began with the entrance of Christ as the high priest upon the judgment phase of his ministry which began in 1844. This is today the belief of the Seventh-Day Adventist Denomination. 1942 Year Book of the Seventh-Day Adventist Denomination, p. 5.

church officers and for delegates to the sessions of the local conferences, with authority to elect conference officers and transact other conference business. This same plan is in turn followed by the local conferences in sending delegates to the union conference sessions, and by the union conferences and divisions in sending delegates to the General Conference session.

The headquarters of the General Conference of Seventh-Day Adventists was originally located at Battle Creek, Michigan, but in the year 1903 it was moved to Takoma Park, Washington, D. C. In that same year the General Conference Corporation of Seventh-Day Adventists was incorporated under the laws of the District of Columbia, and it is this body that holds title to most of the Denomination's real property.

From its humble beginnings the Denomination now has over a half million followers throughout the world.⁵ Of this number, over one hundred and eighty thousand are members within the United States.⁶

C. Activities.—The word of Jesus in Mark 1:17; "Come ye after me, and I will make you fishers of men," motivates the entire field of activity in which the Denomination engages. Though the activities assume various forms, the teaching of the Gospel is the mission.

1. Health and Medical Evangelism.—The teaching of the Bible found in 3 John 2, "Beloved, I wish above all things that thou mayest prosper and be in health even as thy soul prospereth," is the basis for the vast medical program of the Denomination. Medical treatment as taught by the Bible is given practical application among the members of the Denomination and patients at its various institutions. Ab-

⁵ 1942 Year Book of the Seventh-Day Adventist Denomination, p. 2, 288.

⁶ Statistical Report of the Seventh-Day Adventist Conferences in the United States and Canada, First Quarter, 1942, p. 4.

stention from intoxicating liquors, tobacco, and narcotics is taught.⁷ In addition, vegetarianism in accordance with the word of the Bible is followed by the Denomination's health institutions.⁸

In the United States fourteen sanitariums are operated by the Denomination, and these are open to all patients regardless of the religious faith they espouse.⁹ Such well known organizations as the Battle Creek (Mich.) Sanitarium, the Glen Dale (Calif.) Sanitarium, and the Washington (D. C.) Sanitarium are among the institutions founded by the Denomination. Throughout the world a total of ninety sanitariums and sixty-eight treatment rooms and dispensaries are operated.¹⁰

2. *Educational Institutions.*—The development of the faith through education has been a prominent part of the Denomination's work. Throughout the world the Seventh-Day Adventists maintain two thousand six hundred and twenty-six elementary schools, and two hundred and fifty-one academies and colleges, with a total of over one hundred and ten thousand students.¹¹

3. *Publishing Houses.*—The printed word has always been the most effective medium for spreading the Gospel and, since the early days of the Denomination, has been recognized as of fundamental importance in the evangelical mis-

⁷ 1 Cor. 3: 16, 17; 9: 25; 10: 31; 1 Tim. 2: 9, 10; 1 John 2: 6.

⁸ Gen. 1: 29, "And God said, Behold, I have given you every herb bearing seed which is upon the face of all the earth, And every tree in which is the fruit of a tree yielding seed; to you it shall be for meat."

The armed services of the United States purchase for general use some of the health foods produced by the Pacific Union Conference of Seventh-Day Adventists.

⁹ Statistical Report of Seventh-Day Adventist Conferences, 1940, p. 20.

¹⁰ 1942 Year Book of Seventh-Day Adventist Denomination, p. 289.

¹¹ *Id.*, p. 291.

sion.¹² Today 83 publishing houses stretch around the world and issue publications in over 200 languages.¹³ All publishing houses are non-profit organizations. Each is organized as a benevolent, charitable and philanthropic institution, no dividends may be paid to any of its members, and none of its real or personal property is ever expended except to carry into effect the legitimate aims and ends of its being.¹⁴ By both the printed and spoken word, the

¹² Its amazing effectiveness is demonstrated by an incident occurring early in the history of the Denomination: Elder James White, a pioneer of the church, sent, in 1876, a religious volume and some tracts accompanied by a letter to Pitcairn Island. Though nothing further was done, it was learned a decade later that the entire population of the island had decided to change their day of worship from the first day of the week to the seventh and keep the Lord's Sabbath. Howell, *The Great Advent Movement*, p. 175.

¹³ The literature is issued in 202 languages and is prepared in the form of 329 periodicals, 2,338 bound books, 1,355 pamphlets, 5,234 tracts—a total of 9,256 separate publications. 1942 Year Book of the Seventh-Day Adventist Denomination, p. 290; Statistical Report of the Seventh-Day Adventist Conferences in the United States and Canada, First Quarter, 1942, p. 7.

¹⁴ A typical charter provision is that of Article 3 of the Articles of Incorporation of the Review and Herald Publishing Association, Takoma Park, Washington, D. C., which provides: "The general purpose and object for which this corporation is formed is to further, by all proper and legitimate agencies and means, the dissemination of religious and moral instruction; more particularly its purposes and objects are to secure and hold copyrights and plates of tracts, pamphlets, books, and periodicals; to publish, print, and circulate literature in all languages and countries; to receive gifts, legacies, and donations from any source whatever; to make gifts and appropriations from any or all of its resources from time to time; and to exercise all such power and authority as may be necessary to carry out the objects and purposes above specified. But the purpose and essence of this corporation, being purely benevolent, charitable, and philanthropic, it is hereby expressly declared that this is a corporation not for gain, that no dividends shall ever be declared or paid to any of its members, and that none of its property, real or personal, shall ever be used or expended except in carrying into effect the legitimate ends and aims of its being."

Gospel is carried into 412 countries in 824 languages.¹⁵

II

The Colporteur Evangelist System

A. In General.—The materials printed by the Denomination are disseminated by trained "colporteurs".¹⁶ The colportage method of distribution of evangelical literature, as used by the Seventh-Day Adventist Denomination, is as old as the history of printing itself—the sale by itinerant church workers of religious tracts and books throughout the world.¹⁷ There is no alternative system by which such large quantities of literature can be distributed at so low a cost. The colporteur supplies the personal touch necessary to win souls. In 1941 over 1000 Seventh-Day Adventist colporteurs carried the Gospel into thousands of homes, with sales of over a million dollars. By their work many thousands are won to the message of God.

B. The Seventh-Day Adventist Colporteurs.—Scrupulous care is exercised in the selection and training of Seventh-Day Adventist colporteurs. They are "Gospel workers" whose qualifications are equal in standing with those who preach the Gospel.¹⁸ In addition to education and other requirements they must, of course, be consecrated to the zealous desire to bring the Gospel of Jesus Christ to the people. Applicants who have been accepted to enter the literature ministry as colporteur evangelists must attend a training school, and every conference in North America holds these special schools once a year. Frequently work-

¹⁵ 1942 Year Book, p. 287. Government departments and services draw heavily upon the linguists of the Denomination's missionary work, at the moment particularly those familiar with the Japanese tongue.

¹⁶ "One who distributes or sells religious tracts and books." Webster's New International Dictionary, Second Edition, p. 530.

¹⁷ Palmer, *The Printing-Press and the Gospel* (Washington, D. C., 1912).

¹⁸ White, *The Colporteur Evangelist* (Mountain View, Calif., 1930).

ers are brought back from the field for further training.

In the field each worker is under the supervision of a field missionary secretary to whom a report is made weekly. Each receives recompense on a commission basis or by guaranteed payments from the Denomination. After fifteen years of continuous service, each colporteur is entitled to the same pension as retired ministers. His calling is missionary work of the highest order. The literature sold by the colporteur consists, in the main, of religious books. A list of those books generally carried by the colporteur is as follows:

Adult Books:

1. The Holy Bible—King James version.
2. The Great Controversy—A History of the Christian Faith and Beliefs through the Ages.
3. Patriarchs and Prophets—Lives of the Holy Men of Old.
4. The Desire of Ages—The Life of Christ.
5. Bible Questions—Questions and Answers from the Bible.
6. The Christian Physician—Prevention and Cure of Disease.
7. Our Times and Their Meaning—The Bible in Everyday Life.

Children's Books:

1. The Children's Friend—The Story of Jesus.
2. Stories of the Kings—Lives of the Kings from David to Christ.
3. Easy Steps in the Bible Story—From the Creation to Joseph.
4. Men of Might—Stories from Moses to Samuel.
5. Bedtime Stories.

No one of liberal mind could take exception to any of these prints, or to the method by which they are distributed.

III.

The Adverse Effect of the Present Opinion.

In view of the fact that the great bulk of Seventh-Day Adventist literature is, and must be, distributed by the colporteur system, it is obvious that the present decision injuriously affects the spreading of the Gospel by the printed word. The limited means of minority religious groups cannot support the alternative methods of using newspaper space and radio time. Moreover, no alternative has been discovered which can be substituted effectively for the colporteur system.

In many instances license taxes such as those approved by the court would exceed, in small and rural areas where colporteurs work, the *gross* sales of religious literature. These small towns and rural areas are the principal field of colporteur activity. The State of Arizona may be taken as illustrative. Normally that State should be a fruitful ground. Instead, however, over two-thirds of the cities and towns of Arizona enforce ordinances requiring license fees for colporteurs. A tabulation of some of these cities and the fees exacted is as follows:

CITY	POPULATION	LICENSE FEE
Buckeye	1,077	\$10 per quarter
Casa Grande	1,351	\$25 per quarter
Douglas	8,623	\$25 per annum
Duncan	1,050	\$10 per annum
Flagstaff	5,080	\$5 per day
Nogales	5,135	\$50 per day
Phoenix	65,414	\$25 per quarter
Prescott	6,018	\$10 per month
Safford	1,706	\$10 per annum
Tucson	36,818	\$25 per quarter
Wickenburg	734	\$200 per annum
Willcox	806	\$2 per day
Winslow	4,577	\$5 per day
Yuma	5,325	\$5 per day

In other States typical municipal license fees are as follows:

STATE	CITY	POPULATION	LICENSE FEE
California	Berkley	85,547	\$60 per annum
	El Cerrito	6,137	\$10 per quarter
	Roseville	6,653	\$5 per month
	San Diego	203,341	\$2.50 per month
	Woodland	6,637	\$50 per quarter
Florida	Lake Worth	7,408	\$25 per annum
Georgia	Albany	19,055	\$250 per annum
	Griffin	13,223	\$75 per annum
Iowa	Cedar Rapids	62,120	\$75 per annum
	Council Bluffs	41,439	\$10 per day
	Davenport	66,039	\$3 per day
	Dubuque	43,892	\$10 per day
	Fort Dodge	22,904	\$35 per day
	Keokuk	15,076	\$5 per day
	Mason City	27,080	\$3 per day
	Sioux City	82,364	\$25 per day
	Corbin	7,893	\$10 per week
Kentucky	Somerset	6,154	\$7.50 per day
	Ithaca	19,730	\$5 per month
New York	Massena	11,328	\$50 per annum
	Charleroi	10,784	\$5 per day
Penn.	Duquesne	20,693	\$2 per day
	Erie	116,955	\$75 per annum
	Grove City	6,296	\$25 per annum
	New Brighton	9,630	\$5 per day
	Charleston	71,275	\$10 per week
South Carolina	Tacoma	109,408	\$5 per month
Washington	Seattle	368,302	\$5 per month
Wisconsin	Marshfield	10,359	\$10 per day

The foregoing list is by no means complete. It represents only those specimens recently sent in to Denomination Headquarters by the Gospel workers.

The crushing individual and aggregate effect of these fees is apparent. Colporteurs remain in one vicinity for only a brief time, depending on the size of the community. At best their sales of Gospel literature are limited, and they earn for themselves or are paid by the Denomination no more than a modest missionary salary or commission.¹⁹

¹⁹ The published Colporteurs' Summary—North America, 1940-1941 (Exhibit VI herein), shows a total of 1018 colporteurs operating and delivering for the month of December, 1941, \$97,997.19 worth of gospel literature, and for the whole year of 1941 a total of \$790,610.36, or an average of \$776.63 per person for one year, or \$65.00 per month. Many of these, however, are students and temporary workers. Since the Colporteurs

The principal cases considered by the court were not isolated instances of the use of the licensing authority to shut the door upon colporteur evangelists and the spreading of the Gospel. The trend is rather toward the universal adoption of prohibitive fees. In addition to new ordinances which have been adopted, and will unquestionably continue to spring into being as a result of the decision, existing ordinances, heretofore not enforced against colporteurs because of the supposed constitutional guaranty, will be put into vigorous effect. It is not too much to say that the cumulative result may be the ultimate destruction of the Denomination, and it must necessarily curb drastically the missionary method it has developed in the United States without official hindrance for a century.

Despite the conceded necessity of accommodation of conflicting interests of Church, press, and State there must be, according to our constitutional system, a sphere of religious freedom into which the State may not trespass. The colporteur system is a religious rite, a method of carrying the Gospel to otherwise inaccessible places. Yet the Court, by its present decision, denies the right to so spread the Gospel except to those of substance. The denial of the only practical method to carry on this religious work is a denial of the right itself. For these reasons, the Seventh-Day Adventist Denomination requests the court to reopen and rehear these cases in order that the facts, necessary implications, and disastrous results of the present decision upon the propagation of the faith may be thoroughly considered. Nothing less than the freedom of religion is at

receive half of their collections, those who give their entire time to the work earn an average of \$17.60 per week, from which they must pay traveling and living expenses for themselves and their families not only at the time that the orders are taken but also at a later date when the deliveries are made. From the contrast between the amount of municipal license fees and the income of the colporteurs, it is obvious that the payment of such license fees is prohibitory.

stake. Surely so fundamental an essential of civilized people requires this Court to stay its hand until every faith is heard and every result submitted.

Respectfully presented,

HOMER CUMMINGS,
MILLWARD C. TAFT,
*Counsel for the General Conference
of Seventh-Day Adventists.*

September, 1942.

VERIFICATION

Millward C. Taft, being first duly sworn, deposes and says: I am General Counsel of the General Conference of Seventh-Day Adventists with offices at 6848 Eastern Avenue, N. W., Takoma Park, Washington, D. C.; I have read the foregoing brief amicus, and the statements of fact set forth therein are true to the best of my knowledge and belief.

MILLWARD C. TAFT.

Subscribed and sworn to before me this — day of September, 1942.

_____,
*Notary Public for the
District of Columbia.*

My commission expires — —, —.

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October Term, 1941

Office - Supreme Court

FILED

MAR 10 1942

CHARLES ALBANE

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The General Conference of Seventh-Day Adventists sub-
mits this brief as amicus curiae in pursuit of its established

policy to guard against infringement of the free exercise of any religion.¹ This Denomination is well recognized throughout our country, and indeed abroad, for its religious zeal, its earnest faith, its charitable and educational works and its good citizenship. Because of the direct and adverse effect of ordinances of the type here questioned upon the exercise and practice of a tenet of its religious doctrine which is dominant and essential to the continued vigor and vitality of the Denomination itself, this brief is in support of the contentions of the petitioners.

Statement.

The language of the questioned ordinances and the pertinent facts are adequately stated in the opinion of this Court. *Jones v. Opelika*, 316 U. S. 584. For the purpose of this brief it is accepted that the questioned ordinances of the cities of Opelika, Fort Smith and Casa Grande there quoted apply only to the selling and not the mere free distribution of religious books and pamphlets and that this Court, contrary to the contention of the petitioners, properly views the transactions of the petitioners as involving sales.²

The far-reaching effect of decision in the instant cases, particularly its impact on the freedom of worship of the members of the General Conference of Seventh-Day Adventists will be apparent from a brief consideration of its tenets based upon a literal reading of the Bible and of its missionary evangelism including the vending of denominational literature.

There have been filed with the brief amicus on petition for rehearing, as numbered exhibits, the Denomination's

¹ See *Pierce v. Society of Sisters*, 268 U. S. 510, 529.

² Petitioners in Nos. 280 and 314 and appellants in No. 966 are herein collectively referred to as "petitioners".

Annual Year Book for 1942 (Exhibit I), the most recent Statistical Reports of the Denomination and its General Conference (Exhibits II, III, and IV), the Financial Statement of the Seventh-Day Adventist Conferences (Exhibit V), the Colporteurs' Summary for North America for 1940-1941^o (Exhibit VI), and a recent historical and anniversary number of one of the magazines of the Denomination (Exhibit VII). With these as a basis, the origin of the Denomination and its pertinent tenets, including the religious nature and duty of the vending of denominational literature may be briefly sketched.

A. History and Beliefs of the Seventh-Day Adventist Denomination.

1. Origin and Growth.—The roots of the Seventh-Day Adventist Denomination are to be found in the time and place of the first settlements of New England, with its immediate organization in the religious revival at the beginning of the nineteenth century.³

a. Seventh-Day Baptists.—Among the dissentient groups who first came to America were the Baptists, including those who observed the "Bible Sabbath" which fell on the Saturday of the Puritans. The first Sabbathkeeper came to America in 1664, forty-four years after the landing of the Pilgrims. They suffered the religious persecution of the time in New England and were offered haven in Rhode Island by Roger Williams who championed their "most

³ Loughborough, Rise and Progress of Seventh-Day Adventists (Battle Creek, Michigan, 1892); Loughborough, The Great Second Movement (South Bend, Ind., 1905); Andross, Story of the Advent Message (Peekskill, N. Y., 1927); Olsen, A History of the Origin and Progress of Seventh-Day Adventists (Washington, D. C., 3d ed. 1932); Howell, The Great Advent Movement (Washington, D. C., 1935).

⁴ Longacre, Roger Williams—His Life, Work, and Ideals (Washington, D. C., 1939), 74-75, 87-88.

Scriptural" cause.⁴ In a very real sense there was an identity between their birth here and the birth of religious liberty.⁵

b. The Adventists.—Early in the Nineteenth Century, the minds of religious men became particularly concerned with the prophecies of Divine revelation. Many of them, including men of prominence in both the Old World and the New, became enthusiastic converts to the view that the prophetic second coming of the Lord was at hand.⁶

c. The Seventh-Day Adventists.—The faith of the Seventh-Day Adventists Denomination is, in essence, a uniting of the major beliefs of both the Adventists and the Seventh-Day Baptists. Adventists became convinced that the seventh day was the true Bible Sabbath and must be

⁵ The Seventh-Day Baptists accepted Williams' invitation to Rhode Island, and one of them became governor. *Idem.* Williams was the first pastor of the first Baptist church of Providence, the Baptists carried their message of religious freedom to Anglican Virginia, and there Jefferson and Madison became their attorneys in their struggle for religious freedom. *Id.*, 100-101. Rhode Island refused to ratify the Constitution until assured, with the aid of Madison and Jefferson, that the declaration of tolerance in the Bill of Rights would be adopted. *Id.*, 183 *et seq.* As a minority group, the Seventh-Day Adventists, who succeeded the Seventh-Day Baptists, have always stressed the concept of separation of church and state, with complete liberty of conscience in spiritual matters.

⁶ The original leaders of the Adventist movement pointed to the prophecy in the book of Daniel, "And he said unto me, Unto two thousand and three hundred days; then shall the sanctuary be cleansed." Daniel 8:14. These prophetic days they took to be literal years, beginning as they thought from the ninth chapter of Daniel at the going-forth to restore and build Jerusalem in 457 B. C. The period would, therefore, end in the autumn of 1844 A. D. The uneventful passing of the year, of course, caused a decline in the number of Adventists and a revision of their beliefs. Accordingly, many Adventists adopted the view that the sanctuary mentioned by Daniel was not this earth, but the temple of God in Heaven. The cleansing, therefore, of the sanctuary began with the entrance of Christ as the high priest upon the judgment phase of his ministry which began in 1844. This is today the belief of the Seventh-Day Adventist Denomination. 1942 Year Book of the Seventh-Day Adventist Denomination, p. 5.



observed according to the Commandments, and the first Sabbath-keeping Adventist Church was formed at Washington, New Hampshire, in 1844.

d. Present Organization.—In 1861 the name “Seventh-Day Adventists” was formally adopted by the Denomination at Battle Creek, Michigan. In that year the first organizational plans were drawn for the State of Michigan. Two years later the first General Conference session was held and a world wide organization was planned.

The Organization as it exists today is as follows:

1. *The Church.*—A united body of individual believers holding the same faith and doctrines in common.

2. *The Local Conference.*—Or local mission field, which is a united body of churches in a state, province, or local territory.

3. *The Union Conference.*—Or union mission field, which is a united body of conferences or mission fields within a larger territory.

4. *The Division.*—A division or section of the General Conference, embracing local or union conferences or mission fields in large sections of the world field.

5. *The General Conference.*—The general body embracing the church in all parts of the world.

The organization of the Seventh-Day Adventist Church is representative in form. Every church member votes for church officers and for delegates to the sessions of the local conferences, with authority to elect conference officers and transact other conference business. This same plan is in turn followed by the local conferences in sending delegates to the union conference sessions, and by the union conferences and divisions in sending delegates to the General Conference session.

The headquarters of the General Conference of Seventh-Day Adventists, originally located at Battle Creek, Michigan, was moved to Takoma Park, Washington, D. C., in 1903. In that same year the General Conference Corporation of Seventh-Day Adventists was incorporated under the laws of the District of Columbia, and it is this body that holds title to most of the Denomination's real property.

Of its more than half million followers throughout the world,⁷ the Denomination numbers over one hundred and eighty thousand members within the United States.⁸

2. Missionary Evangelism.—The word of Jesus in Mark 1:17, "Come ye after me, and I will make you fishers of men," motivates the entire field of activity in which the Denomination engages. Though the activities assume various forms, the teaching of the Gospel is the mission.

a. Health and Medical Evangelism.—The teaching of the Bible found in 3 John 2, "Beloved, I wish above all things that thou mayest prosper and be in health even as thy soul prospereth," is the basis for the vast medical program of the Denomination. Medical treatment as taught by the Bible is given practical application among the members of the Denomination and patients at its various institutions. Abstention from intoxicating liquors, tobacco, and narcotics is taught.⁹ In addition, vegetarianism in accordance with the word of the Bible is followed by the Denomination's health institutions.¹⁰

⁷ 1942 Year Book of the Seventh-Day Adventist Denomination, p. 2, 288.

⁸ Statistical Report of the Seventh-Day Adventist Conferences in the United States and Canada, First Quarter, 1942, p. 4.

⁹ 1 Cor. 3:16, 17; 9:25; 10:31; 1 Tim. 2:9, 10; 1 John 2:6.

¹⁰ Gen. 1:29, "And God said, Behold, I have given you every herb bearing seed which is upon the face of all the earth, And every tree in which is the fruit of a tree yielding seed; to you it shall be for meat."

The armed services of the United States purchase for general use some of the health foods produced by the Pacific Union Conference of Seventh-Day Adventists.

In the United States fourteen sanitariums are operated by the Denomination, and these are open to all patients regardless of the religious faith they espouse.¹¹ Such well known organizations as the Battle Creek (Mich.) Sanitarium, the Glen Dale (Calif.) Sanitarium, and the Washington (D. C.) Sanitarium are among the institutions founded by the Denomination. Throughout the world a total of ninety sanitariums and sixty-eight treatment rooms and dispensaries are operated.¹²

b. Educational Institutions.—The development of the faith through education has been a prominent part of the Denomination's work. Throughout the world the Seventh-Day Adventists maintain two thousand six hundred and twenty-six elementary schools, and two hundred and fifty-one academies and colleges, with a total of over one hundred and ten thousand students.¹³

c. Publishing Houses.—The printed word has always been the most effective medium for spreading the Gospel and, since the early days of the Denomination, has been recognized as of fundamental importance in the evangelical mission.¹⁴ Today 83 publishing houses stretch around the world and issue publications in over 200 languages.¹⁵ All

¹¹ Statistical Report of Seventh-Day Adventist Conferences, 1940, p. 20.

¹² 1942 Year Book of Seventh-Day Adventist Denomination, p. 289.

¹³ *Id.*, p. 291.

¹⁴ Its amazing effectiveness is demonstrated by an incident occurring early in the history of the Denomination. Elder James White, a pioneer of the church, sent, in 1876, a religious volume and some tracts accompanied by a letter to Pitcairn Island. Though nothing further was done, it was learned a decade later that the entire population of the island had decided to change their day of worship from the first day of the week to the seventh and keep the Lord's Sabbath. Howell, *The Great Advent Movement*, p. 175.

¹⁵ The literature is issued in 202 languages and is prepared in the form of 329 periodicals, 2,338 bound books, 1,355 pamphlets, 5,234 tracts—a total of 9,256 separate publications. 1942 Year Book of the Seventh-Day Adventist Denomination, p. 290; Statistical Report of the Seventh-Day Adventist Conferences in the United States and Canada, First Quarter, 1942, p. 7.

publishing houses are non-profit organizations. Each is organized as a benevolent, charitable and philanthropic institution, no dividends may be paid to any of its members, and none of its real or personal property is ever expended except to carry into effect the legitimate aims and ends of its being.¹⁶ By both the printed and spoken word; the Gospel is carried into 412 countries in 824 languages.¹⁷

B: The Colporteur Evangelist System.

An essential part of the Denomination's religious creed and activity, upon which they depend for their very existence, is the colporteur evangelist system.

The materials printed by the Denomination are disseminated by trained "colporteurs"¹⁸ The colportage method of distribution of evangelical literature, as used by the Seventh-Day Adventist Denomination, is as old as the history of printing itself—the sale by itinerant church work-

¹⁶ A typical charter provision is that of Article 3 of the Articles of Incorporation of the Review and Herald Publishing Association, Takoma Park, Washington, D. C., which provides: "The general purpose and object for which this corporation is formed is to further, by all proper and legitimate agencies and means, the dissemination of religious and moral instruction; more particularly its purposes and objects are to secure and hold copyrights and plates of tracts, pamphlets, books, and periodicals; to publish, print, and circulate literature in all languages and countries; to receive gifts, legacies, and donations from any source whatever; to make gifts and appropriations from any or all of its resources from time to time; and to exercise all such power and authority as may be necessary to carry out the objects and purposes above specified. But the purpose and essence of this corporation, being purely benevolent, charitable, and philanthropic, it is hereby expressly declared that this is a corporation not for gain, that no dividends shall ever be declared or paid to any of its members, and that none of its property, real or personal, shall ever be used or expended except in carrying into effect the legitimate ends and aims of its being."

¹⁷ 1942 Year Book, p. 287. Government departments and services draw heavily upon the linguists of the Denomination's missionary work, at the moment particularly those familiar with the Japanese tongue.

¹⁸ "One who distributes or sells religious tracts and books." Webster's New International Dictionary, Second Edition, p. 530.

ers of religious tracts and books throughout the world.¹⁹ There is no alternative system by which such large quantities of literature can be distributed at so low a cost. The colporteur supplies the personal touch necessary to win souls. In 1941 over 1000 Seventh-Day Adventist colporteurs carried the Gospel into thousands of homes, with sales of over a million dollars. By their work many thousands are won to the message of God.

Scrupulous care is exercised in the selection and training of Seventh-Day Adventist colporteurs. They are "Gospel workers" whose qualifications are equal in standing with those who preach the Gospel.²⁰ In addition to education and other requirements they must, of course, be consecrated to the zealous desire to bring the Gospel of Jesus Christ to the people. Applicants who have been accepted to enter the literature ministry as colporteur evangelists must attend a training school, and every conference in North America holds these special schools once a year. Frequently workers are brought back from the field for further training.

In the field each worker is under the supervision of a field missionary secretary to whom a report is made weekly. Each receives recompense on a commission basis or by guaranteed payments from the Denomination. After fifteen years of continuous service, each colporteur is entitled to the same pension as retired ministers. His calling is missionary work of the highest order. The literature sold by the colporteur consists, in the main, of religious books. A list of those books generally carried by the colporteur is as follows:

Adult Books:

1. The Holy Bible—King James version.
2. The Great Controversy—A History of the Christian Faith and Beliefs through the Ages.

¹⁹ Palmer, *The Printing-Press and the Gospel* (Washington, D. C., 1912).

²⁰ White, *The Colporteur Evangelist* (Mountain View, Calif., 1930).

3. Patriarchs and Prophets—Lives of the Holy Men of Old.

4. The Desire of Ages—The Life of Christ.

5. Bible Readings—Questions and Answers from the Bible.

6. The Home Physician—Prevention and Cure of Disease.

7. Our Times and Their Meaning—The Bible in Everyday Life.

Children's Books:

1. The Children's Friend—The Story of Jesus.

2. Stories of the Kings—Lives of the Kings from David to Christ.

3. Easy Steps in the Bible Story—From the Creation to Joseph.

4. Men of Might—Stories from Moses to Samuel.

5. Bedtime Stories.

From the time of the adoption of the First and Fourteenth Amendments until a year ago the heavy hand of government never fell upon this Denomination. They grew, they prospered, they obeyed their consciences, they worshipped their God, they spread the Gospel, they wrought their good works and gained the respect of all right thinking people. Then there broke out in America a rash of ill-considered municipal ordinances, designed, it would seem, to break down another and quite different religious group—those who have brought the pending cases. But from the by-product of this local intolerance the Seventh-Day Adventist faith suffered as well.

Thus, the judgment of this Court struck a heavy blow at the Denomination. Moreover, since the date of the opinion of this Court, June 8, 1942, similar ordinances, rising like a flood, threaten to overwhelm this old and honorable religious faith, and, if permitted to stand, will disrupt its organization, curtail its activities, diminish its revenue, impair its usefulness and, as we contend, deny to its membership their constitutional right to religious freedom.

ARGUMENT.

The majority opinion sustains the questioned ordinances on the theory that the fee is "a non-discriminatory license fee; presumably appropriate in amount". And again—"Nothing more is asked from one group than from another which uses similar methods of propagation. We see nothing in the collection of a non-discriminatory license fee, uncontested in amount, from those selling books or papers, which abridges the freedoms of worship, speech and press."

But this avoids the crucial question. The feature called "non-discriminatory" possesses no merit and is, indeed, irrelevant. A horizontal line may not be drawn through the activities of the American people, including those protected by constitutional provisions and those not so protected, imposing burdens, and the proceeding then justified upon the theory that everyone is treated alike. The constitution clearly indicates that the treatment must *not* be alike—but different. What may be done in the one case and what must be avoided in the other follows from a mere reading of the Constitution. The First and Fourteenth Amendments have placed free religion, free speech and free press in a preferred position. They may not be burdened or hampered or impaired. They may not be dispossessed from their high estate. They are sacred—always—against destruction or seemingly minor invasion.

Likewise to argue that the so-called fees are "presumably reasonable" is to fly in the face of the record and to do violence to common sense. The Constitution does not contemplate any fee or any tax or any act that interferes with the free exercise of religion. But where, as in the instant cases, the substantial taxes are either for revenue or for the purpose of striking down a religious faith, no sophistry can conceal their unconstitutionality.

The free exercise of religion is unconstitutionally invaded by the taxes here involved because they were plainly enacted with prohibitory purpose under the mere guise of taxes.

It is, of course, established that the fundamental rights of free speech, press and religion expressly recognized by the First Amendment are also protected by the Fourteenth Amendment against destruction or invasion by the States. *Near v. Minnesota*, 283 U. S. 697, 707; *Lovell v. Griffin*, 303 U. S. 444, 450; *Hague v. C. I. O.*, 307 U. S. 496, 503; *Schneider v. State*, 308 U. S. 147, 160. "In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation." *Schneider v. State*, supra, p. 161. "It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations". *Thornhill v. Alabama*, 310 U. S. 88, 96. No reason appears why this Court should blind itself to the realities of these cases and refuse to recognize the prohibitory objective manifestly underlying the licensing ordinances. The suppressive effect on distribution of the transient sort here involved is apparent on the face of the ordinances. Obviously the requirement of the Opelika ordinance of a \$5.00 exaction from transient distributors, the Fort Smith exaction of \$2.50 per day and the Casa Grande requirement of \$25 per quarter must in many cases either deter or altogether prevent the distribution of pamphlets, leaflets and books by persons situated as are the petitioners.

Statistics accumulated by the General Conference of Seventh-Day Adventists make even more plain that the ordinances before the Court are not isolated instances but

are merely manifestations of a wave of so-called licensing legislation which cannot reasonably be regarded as other than prohibitive in purpose and effect. Particularly in the small and rural areas, where colporteurs can ordinarily be most effective and in fact do most of their work, these exactions would in many, if not most, cases exceed the gross amount of sales of religious literature.

The State of Arizona may be taken as illustrative. Normally that State should be a fruitful ground. Instead, however, over two-thirds of the cities and towns of Arizona enforce ordinances requiring licenses for colporteurs. A tabulation of some of these cities and the amounts exacted is as follows:

CITY	POPULATION	LICENSE
Buckeye	1,077	\$10 per quarter
Casa Grande	1,351	\$25 per quarter
Douglas	8,623	\$25 per annum
Duncan	1,050	\$10 per annum
Flagstaff	5,080	\$5 per day
Flagstaff	5,135	\$50 per day
Phoenix	65,414	\$25 per quarter
Prescott	6,018	\$10 per month
Safford	1,706	\$10 per annum
Tucson	36,818	\$25 per quarter
Wickenburg	734	\$200 per annum
Willcox	806	\$2 per day
Winslow	4,577	\$5 per day
Yuma	5,325	\$5 per day

In other States typical municipal license exactions are as follows:

STATE	CITY	POPULATION	LICENSE
California	Berkeley	85,547	\$60 per annum
	El Cerrito	6,137	\$10 per quarter
	Roseville	6,653	\$5 per month
	San Diego	203,341	\$2.50 per month
	Woodland	6,637	\$50 per quarter
Florida	Lake Worth	7,408	\$25 per annum
Georgia	Albany	19,055	\$250 per annum
	Griffin	13,223	\$75 per annum
Iowa	Cedar Rapids	62,120	\$75 per annum
	Council Bluffs	41,439	\$10 per day
	Davenport	66,039	\$3 per day
	Dubuque	43,892	\$10 per day
	Fort Dodge	22,904	\$35 per day
	Keokuk	15,076	\$5 per day
	Mason City	27,080	\$3 per day
	Sioux City	82,364	\$25 per day

STATE	CITY	POPULATION	LICENSE
Kentucky	Corbin	7,893	\$10 per week
	Somerset	6,154	\$7.50 per day
New York	Ithaca	19,730	\$5 per month
	Massena	11,328	\$50 per annum
Penn.	Charleroi	10,784	\$5 per day
	Duquesne	20,693	\$2 per day
	Erie	116,955	\$75 per annum
	Grove City	6,296	\$25 per annum
	New Brighton	9,630	\$5 per day
South Carolina	Charleston	71,275	\$10 per week
Washington	Tacoma	109,408	\$5 per month
	Seattle	368,302	\$5 per month
Wisconsin	Marshfield	10,359	\$10 per day

The foregoing list is by no means complete. It represents only those specimens recently sent in to Denomination Headquarters by the Gospel workers.

The crushing individual and aggregate effect of these impositions is apparent. Colporteurs remain in one vicinity for only a brief time, depending on the size of the community. At best their sales of Gospel literature are limited, and they earn for themselves or are paid by the Denomination no more than a modest missionary salary or commission.²¹

The principal cases now under consideration by the Court are not isolated instances of the use of the licensing authority to shut the door upon colporteur evangelists and the spreading of the Gospel. The trend is rather toward the universal adoption of prohibitive license taxes. In addition

²¹ The published Colporteurs' Summary—North America, 1940-1941 (Exhibit VI herein), shows a total of 1018 colporteurs operating and delivering for the month of December, 1941, \$97,997.19 worth of gospel literature, and for the whole year of 1941 a total of \$790,610.36, or an average of \$776.63 per person for one year, or \$65.00 per month. Many of these, however, are students and temporary workers. Since the colporteurs receive half of their collections, those who give their entire time to the work earn an average of \$17.60 per week, from which they must pay traveling and living expenses for themselves and their families not only at the time that the orders are taken but also at a later date when the deliveries are made. From the contrast between the amount of municipal license fees and the income of the colporteurs, it is obvious that the payment of such license exactions is prohibitory.

to new ordinances which have been adopted, and will unquestionably continue to spring into being as a result of the decision, existing ordinances, heretofore not enforced against colporteurs because of the supposed constitutional guaranty, will be put into vigorous effect. It is not too much to say that the cumulative result may be the ultimate destruction of the Denomination, and it must necessarily curb drastically the missionary method it has developed in the United States without official hindrance for a century.

This Court, with penetrating examination of the substance and application of the particular statute, has on numerous occasions disregarded the mere designation of an exaction as a tax. Where, as here, there is a gross disproportion between the exaction and the amount of income that may reasonably be anticipated from the activity taxed, indicating its practical inhibition and the impossibility of thereby raising revenue, the exacting enactment is properly to be regarded as a prohibition rather than a revenue measure. *Child Labor Tax Case*, 259 U. S. 20, 36-37; *Trusler v. Crooks*, 269 U. S. 475, 482; *United States v. Constantine*, 296 U. S. 287, 294. Resort to the taxing power to effectuate an end which is not legitimate, not within the constitutional authority but expressly withdrawn therefrom, cannot be approved. Cf. *United States v. Butler*, 297 U. S. 1, 69.

It is submitted that the absolute personal rights of free speech and religious freedom here involved are no less important and are to be guarded with no less vigilance than was the line of demarcation between federal and state powers in the cases above cited.

Exaction of a tax in a fixed amount as a condition to the non-commercial dissemination of religious books or pamphlets, violates the religious liberty guaranteed by the Constitution.

The records in these cases show that petitioners were prosecuted for selling pamphlets which set forth the religious beliefs of their sect and that the monies derived from such sales were neither sufficient in amount, nor ultimately devoted to such purpose as to justify treating the activities of petitioners or of those who published the matter distributed by them as involving anything other than religious objectives. The funds collected are used for the propagation of the religious beliefs of petitioners. The taxes in question exact a fixed amount unrelated to the question of the defendant's activities or the amount of the receipts, gross or net, derived from the sale of their pamphlets. The impairment of religious freedom and the right of free speech is plain.

Even if it be deemed that this tax is not a mere disguised attempt by indirection to suppress the exercise of religious activity which could not directly be impaired by exercise of the police power, and even though it be conceded that threatened destruction of a particular occupation is ordinarily no basis for restraint of otherwise valid taxation (*Magnano Co. v. Hamilton*, 292 U. S. 40, 44-45), it is nevertheless clear that the taxes here involved must be held invalid. The first ten Amendments were contemporaneous with the Constitution and, with respect to their provisions, as in interpretation of the original, account must be taken of "The necessities which gave birth to the Constitution, the controversies which preceded its formation and the conflicts of opinion which were settled by its adoption. . . ."

Knowlton v. Moore, 178 U. S. 41, 95. Since, as is amply shown by the authorities cited in the respective dissenting opinions of the Chief Justice and of Mr. Justice Murphy (316 U. S. 610, 616), the asserted impairment of the guaranteed right is not only direct but is occasioned by taxes essentially identical in their suppression of circulation with the stamp taxes which inspired the provisions of the First and the protection of the Fourteenth Amendment, clearly those Amendments must be regarded as mere words if they do not protect against this bold encroachment.

The same conclusion follows from reference to the practical operation of the ordinance in question. When regard is had to the uncertainty of the amount to be obtained from the exercise of the licensed "privilege", it is plain that with respect to persons generally who might otherwise engage as transient agents for, or dealers in, books of any description, the prerequisite payment in advance must discourage some and be a deterrent element as to all. As to the

²² It is not here contended that the dissemination of intelligence, religious or otherwise, is free of all restraint. In its name the citizen may do nothing directly harmful to the public welfare. *Barnette v. West Virginia State Board of Ed.*, 47 F. Supp. 251, 253. It seems clear that while the right of religious liberty may not be curtailed, the State under the police power may employ certain regulations in the public interest to prevent its abuse. *Reynolds v. United States*, 98 U. S. 145, 163; *Davis v. Beason*, 133 U. S. 333, 342; *Schneider v. State*, 308 U. S. 147, 165; *Cantwell v. Connecticut*, 310 U. S. 296, 308; *Cox v. New Hampshire*, 312 U. S. 569, 574; *Shapiro v. Lyle*, 30 F. (2d) 971.

And since there is no contention that the impositions here involved are "fees" there is no need to argue that a reasonable fee to cover the actual expense of regulatory licensing to prevent frauds might not properly be exacted. Neither is it necessary to argue here the invalidity of a license tax measure by a percentage of the gross receipts derived from sales of religious books, or pamphlets and used exclusively for religious purposes. In *Giragi v. Moort*, 64 P. 2d 819 (Ariz.) app. dism. 301 U. S. 670, the Court speaking of the gross receipts business privilege tax said (p. 822): " . . . all who share the protection given by the government should also share the expense of that protection in proportion to their ability regardless of the business they are engaged in, if it is for profit." (Emphasis supplied).

petitioners here, it seems plain that the absence of a countervailing possibility of profit must inevitably tend in a much greater degree to discourage and suppress their activities in exercise of their religious beliefs.

Furthermore, as to ordinary interstate commerce, relying on a mere implied jurisdictional immunity this Court has long held that similar fixed-sum license taxes, even though non-discriminatory, are nevertheless void as to those who solicit interstate purchases because in violation of the commerce clause. *Robbins v. Shelby Taxing District*, 120 U. S. 480, 497; *Brennan v. Titusville*, 153 U. S. 289; *Real Silk Mills v. Portland*, 268 U. S. 325, 335. The religious of all sects, then, will feel that there is more than mere anomaly—rather fundamental error—in a course of reasoning which, under the commerce clause, holds sacrosanct from license taxes the vendors of womens' hosiery, *Real Silk Mills v. Portland*, 268 U. S. 225, 335, and at the same time impairs religious liberty by holding identical taxes to be properly laid on the non-commercial distributors of religious books and pamphlets.

The right of religious liberty, with that of free speech, is guaranteed not only against destruction but is protected as well against abridgment or curtailment. *DeJonge v. Oregon*, 299 U. S. 353, 365. Therefore the protection ordained by the founding fathers would plainly not be satisfied even if it be assumed that with respect to religious liberty this Court could by continuous supervision adequately guard against consummation of the rule "That the power to tax involves the power to destroy." Cf. concurring opinion of Mr. Justice Frankfurter in *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 439-490.

Once let the activities of petitioners be recognized as subject even to non-discriminatory license taxes and they will be embarked on the chartless sea of reasonableness of classi-

fication. *Caskey Baking Co. v. Virginia*, 313 U. S. 117, 121. With respect to the fundamental rights here involved, it is unnecessary in this Court to enlarge upon the possibilities of prejudice to dissemination of religious thought by means of discriminatory though constitutional classification in tax ordinances or to do more than thus suggest the potential burdens upon, and dangers to, these fundamental rights which might thus arise. Cf. *Thornhill v. Alabama*, 310 U. S. 88, 97.

Indeed, recently and in widely separated localities, to the detriment of members of Jehovah's witnesses and to the benefit of Adventist colporteurs, there has been administrative discrimination in the enforcement of similar license taxes such as was found in *McConkey v. Fredericksburg*, 179 Va. 556, 19 S. E. (2nd) 682, and suggested as a possibility by Mr. Justice Murphy in his dissenting opinion, *Jones v. Opelika*, 316 U. S. 584, 617.

The controlling principle in these cases is that long ago enunciated by this Court in *Boyd v. United States*, 116 U. S. 616, 635:

"It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

Conclusion.

In the religious practices of the Seventh-Day Adventists there is no peril to the State. On the contrary, their Denomination has been and still is a pillar of the State. They ask the protection of this Court that they may survive. Tyranny and lawlessness reside in these ordinances—not in the faith of these good people. The ordinances must be stricken down—not the religion.

Respectfully submitted,

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Day Adventists.*

March, 1943.

(4954)

(10)
SUPREME COURT OF THE UNITED STATES.

Nos. 280, 314 and 966.—OCTOBER TERM, 1941.

280 Rosco Jones, Petitioner,
vs.
City of Opelika. } On Writ of Certiorari to
the Supreme Court of the
State of Alabama.

314 Lois Bowden and Zada Sanders,
Petitioners,
vs.
City of Fort Smith, Arkansas. } On Writ of Certiorari to
the Supreme Court of the
State of Arkansas.

966 Charles Jobin, Appellant,
vs.
The State of Arizona. } Appeal from the Supreme
Court of the State of Ari-
zona.

[June 8, 1942.]

Mr. Justice REED delivered the opinion of the Court.

By writ of certiorari in Nos. 280 and 314 and by appeal in No. 966 we have before us the question of the constitutionality of various city ordinances imposing the license taxes upon the sale of printed matter for nonpayment of which the appellant, Jobin, and the petitioners, Jones, Bowden and Sanders, all members of the organization known as Jehovah's Witnesses, were convicted.

No. 280.

The City of Opelika, Alabama, filed a complaint in the Circuit Court of Lee County charging petitioner Jones with violation of its licensing ordinance by selling books without a license, by operating as a Book Agent without a license, and by operating as a transient agent, dealer or distributor of books without a license.¹ The license fee for Book Agents (Bibles excepted) was \$10 per annum, that for transient agents, dealers or distributors of books

¹ "4. Penalties. It shall be unlawful for any person . . . to engage in any of the businesses or vocations for which a license may be required without first having procured a license therefor, and any violation hereof shall constitute a criminal offense, and shall be punishable by fine . . . and by imprisonment.

"9. Persons Engaged In Two or More Vocations. All trades or vocations dealing in two or more of the articles or engaged in two or more of the trades

\$5.² Under section 1 of the ordinance all licenses were subject to revocation in the discretion of the City Commission, with or without notice.³ There is a clause providing for severance in case of invalidity of any section, condition or provision.⁴ Petitioner demurred, alleging that the ordinance because of unlimited discretion in revocation and requirement of a license was an unconstitutional encroachment upon freedom of the press. During the trial without a jury these contentions, with the added claim of interference with freedom of religion, were renewed at the end of the city's case, and at the close of all the evidence. The court overruled these motions, and found petitioner guilty on evidence that without a license he had been displaying pamphlets in his up-raised hand and walking on a city street selling them two for five cents.⁵ The court excluded as irrelevant testimony designed to

or vocations for which licenses are required by the City, shall pay for and take out licenses for each line of business, calling or vocation.

"12. Vocations Not Specified Herein. Any applicant desiring to conduct any business or vocation other than those specified in this license ordinance shall make application to the President of the Commission, who shall thereon fix a reasonable license for such business or vocation and instruct the Clerk as to the amount so fixed."

"Agents (Annual Only)

Book Agents (Bibles excepted) 10.00

Transient or itinerant agents selling rugs, antiques, goods, wares, merchandise or taking orders for same 25.00

"Peddlers, or itinerant dealers, distributors or salesmen not otherwise included in this schedule (Annual Only) 75.00

"Transient Agents or Dealers or Distributors of Books (Annual Only) 5.00

"Transient Dealers 25.00
(Not covered heretofore in this schedule, definition same as transient dealer.)

"There will be an issuance fee of \$0.50 added to and collected on each license."

"1. Right of City to Revoke. All licenses, permits or other grants to carry on any business, trade, vocation, or professions for which a charge is made by the City shall be subject to revocation in the discretion of the City Commission, with or without notice to the licensee."

"Should any section, condition, or provision or any rate or amount scheduled as against any particular occupation exhibited in the foregoing schedule be held void or invalid, such invalidity shall not affect any other section, rate or provision of this license schedule."

"His wife was selling pamphlets from a portable stand on the sidewalk nearby."

show that the petitioner was an ordained minister, and that his activities were in furtherance of his beliefs and the teachings of Jehovah's Witnesses. Once again by an unsuccessful motion for new trial the constitutional issues were raised. The Court of Appeals of Alabama reversed the conviction on appeal because it thought the unlimited discretion of the City Commission to revoke the licenses invalidated the ordinance. Without discussion of this point the Supreme Court of Alabama decided that non-discriminatory licensing of the sale of books or tracts was constitutional, reversed the Court of Appeals, and stayed execution pending certiorari. 241 Ala. 279, 3 So. 2d 76. This Court, having granted certiorari, 314 U. S. 593, dismissed the writ for lack of a final judgment. — U. S. —. The Court of Appeals thereupon entered a judgment sustaining the conviction, which was affirmed by the Alabama Supreme Court and is final. — Ala. —. We therefore grant the petition for rehearing of the dismissal of the writ, and proceed with the consideration of the case.

No. 314.

Petitioners Bowden and Sanders were arrested by police officers of Fort Smith, Arkansas, brought before the Municipal Court on charges of violation of City Ordinance No. 1172, and convicted. They appealed to the Sebastian Circuit Court, and there moved to dismiss on the ground that the ordinance was an unconstitutional restriction of freedom of religion and of the press, contrary to the Fourteenth Amendment. The circuit judge heard the case de novo without a jury on stipulated facts. The ordinance required a license "For each person peddling dry goods, notions, wearing apparel, household goods or other articles not herein or otherwise specifically mentioned \$25 per month, \$10 per week, \$2.50 per day." The petitioners, in the exercise of their beliefs concerning their duty to preach the gospel, admitted going from house to house without a license, playing phonographic

"Be it Ordained by the Board of Commissioners of the City of Fort Smith, Arkansas:

"Section 1. That the license hereinafter named shall be fixed and imposed and collected at the following rates and sums and it shall be unlawful for any person or persons to exercise or pursue any of the following vocations of business in the city of Fort Smith, Arkansas, without first having obtained a license therefor from the city clerk and having paid for the same. . . .

"Section 40. For each person peddling dry goods, notions, wearing apparel, household goods or other articles not herein or otherwise specifically mentioned \$25 per month, \$10 per week, \$2.50 per day. A person, firm or corporation using two or more men in their peddling business \$50 per annum."

transcriptions of Bible lectures, and distributing books setting forth their views to the residents in return for a contribution of twenty-five cents per book. When persons desiring books were unable to contribute, the books were in some instances given away free. The Circuit judge concluded as a matter of law that the books were "other goods" and that petitioners were guilty of peddling without a license. A motion for new trial was denied. On appeal the Supreme Court of Arkansas held the ordinance constitutional on the authority of its previous decision in *Cook v. Harrison*, 180 Ark. 546, 21 S. W. 2d 966, and affirmed the convictions. 202 Ark. 614, 151 S. W. 2d 1000. This Court denied certiorari, 314 U. S. 651, but later, because of the similarity of the issues presented to those in the *Jobin* case, No. 966, vacated the denial of certiorari and issued a writ. —U. S. —

No. 966.

The City of Casa Grande, Arizona, by ordinance made it a misdemeanor for any person to carry on any occupation or business specified without first procuring a license.⁷ Transient merchants, peddlers and street vendors were listed as subject to a quarterly license fee of \$25.00, payable in advance.⁸ In the Superior Court of Pinal County *Jobin* was tried and convicted by a jury on a complaint charging that not having "a permanent place of business in the City" he there carried on the "business of peddling, vending, selling, offering for sale and soliciting the sale of goods, wares and merchandise, to wit: pamphlets, books and publications without first having procured a license," contrary to

⁷ "Section 1. It shall be unlawful for any person . . . to carry on any trade, calling, profession, occupation or business, in this ordinance specified, without first having procured a license from the City of Casa Grande, so to do, . . . and each and every day or fractional part of a day that any trade, calling, profession, business or occupation in this ordinance specified is conducted or carried on without such license shall be a misdemeanor, . . .

"Section 2. It shall be the duty of the City Clerk . . . to prepare and to issue a license under this ordinance for every person . . . liable to pay a license hereunder. . .

"Section 4. . . . Every person having such a license, and not having a fixed place of business shall carry such license with him at all times while carrying on the trade . . . or business for which the same was granted. Every person . . . having a license . . . shall produce and exhibit the same, . . . whenever requested to do so by any police officer or by any other officer authorized to issue, inspect or collect licenses."

⁸ "Section 12. Peddlers, Transient Merchants; Vendors. defined:

(A) 'Transient Merchant' within the meaning of this ordinance shall include every person who, not for or in connection with a business at a fixed

the ordinance. The evidence for the state showed that without a license the appellant called at two homes and a laundry and offered for sale and sold books and pamphlets of a religious nature. At one home, accompanied by his wife, he was refused admission, but was allowed by the girl who came to the door to play a portable phonograph on the porch. The girl purchased one of his stock of books, "Religion," for a quarter, and received a pamphlet free. During the conversation he stated that he was an ordained minister preaching the gospel and quoted passages from the Bible. At the second home the lady of the house allowed him and his wife to enter and play the phonograph, but she refused to buy either books or pamphlets. When departing the appellant left some literature on the table although informed by the lady that it would not be read and had better be given to someone else. At the laundry the appellant introduced himself as one of the Jehovah's Witnesses and discussed with the proprietor their work and religion generally. The proprietor bought the book "Religion" for a quarter but declined to buy others at the same price. He was given a pamphlet free. When arrested the appellant stated that he was "selling religious books and preaching the gospel of the kingdom," and that because of his religious beliefs he would not take out a license. A motion at the close of the evidence for a directed verdict of acquittal on the ground that the ordinance violated the Fourteenth Amendment was denied. The jury was instructed to acquit unless it found the defendant was selling books or pamphlets. It returned a verdict of guilty. On appeal the Supreme Court of Arizona held that the ordinance, an "ordinary occupational license tax ordinance," did not deny freedom of religion and of the press and

place within the City of Casa Grande, solicits orders from house to house for the future delivery of goods, or who shall deliver goods previously solicited by a solicitor, at retail, or an order for future delivery.

(B) As used in this ordinance, the term 'peddlers' shall include solicitors and other vendors not having a permanent place of business in the City of Casa Grande, and who are not specifically licensed or permitted to sell any class of goods whatsoever.

(C) As used in this Ordinance, the term 'Street Vendors' includes all persons engaged in selling in or upon the streets, alleys or vacant grounds within the City, any goods, wares, merchandise or articles, including photographs, and also includes all persons engaged in conducting upon the streets, alleys, or vacant grounds of the City any ring, knife or similar game, or any 'faker' business, game or device.

All persons coming within the definition of the occupations defined herein shall pay a quarterly license fee of Twenty Five Dollars (\$25.00), in advance."

affirmed the conviction. 118 P. 2d 97. An appeal to this Court was allowed under § 237 of the Judicial Code, 28 U. S. C. § 344.

The Opelika ordinance required book agents to pay \$10.00 per annum, transient distributors of books (annual only) \$5.00. The license fee in Casa Grande was \$25 per quarter, that in Fort Smith ranged from \$2.50 per day to \$25 per month. All the fees were small, yet substantial. But the appellant and the petitioners, so far as the records disclose, advanced no claim and presented no proof in the courts below that these fees were invalid because so high as to make the cost of compliance a deterrent to the further distribution of their literature in those cities. Although petitioners in No. 314 contended that their enterprise was operated at a loss, there was no suggestion that they could not obtain from the same sources which now supply the funds to meet whatever deficit there may be sums sufficient to defray license fees also. The amount of the fees was not considered in the opinions below except for a bare statement by the Alabama court that the exaction was "reasonable", and neither the briefs nor the assignments of error in this Court have directed their attack specifically to that issue. Consequently there is not before us the question of the power to lay fees, objectionable in their effect because of their size, upon the constitutionally protected rights of free speech, press or the exercise of religion. If the size of the fees were to be considered, to reach a conclusion one would desire to know the estimated volume, the margin of profit, the solicitor's commission, the expense of policing and other pertinent facts of income and expense. In the circumstances we venture no opinion concerning the validity of license taxes if it were proved, or at least distinctly claimed, that the burden of the tax was a substantial clog upon activities of the sort here involved.⁹ The sole constitutional question considered is whether a nondiscriminatory license fee, presumably appropriate in amount, may be imposed upon these activities.

We turn to the constitutional problem squarely presented by these ordinances. There are ethical principles of greater value to mankind than the guarantees of the Constitution, personal liberties which are beyond the power of government to impair. These

⁹ Cf. *Seaboard Air Line Ry. v. Watson*, 287 U. S. 86; *New York v. Kleinert*, 268 U. S. 646; *Dewey v. Des Moines*, 173 U. S. 193; and *Clark v. Paul Gray, Inc.*, 306 U. S. 583; *Standard Stock Food Co. v. Wright*, 225 U. S. 540.

principles and liberties belong to the mental and spiritual realm where the judgments and decrees of mundane courts are ineffective to direct the course of man. The rights of which our Constitution speaks have a more earthly quality. They are not absolutes¹⁰ to be exercised independently of other cherished privileges, protected by the same organic instrument. Conflicts in the exercise of rights arise and the conflicting forces seek adjustments in the courts, as do these parties, claiming on the one side the freedom of religion, speech and the press, guaranteed by the Fourteenth Amendment,¹¹ and on the other the right to employ the sovereign power explicitly reserved to the State by the Tenth Amendment to ensure orderly living without which constitutional guarantees of civil liberties would be a mockery.¹² Courts, no more than Constitutions, can intrude into the consciences of men or compel them to believe contrary to their faith or think contrary to their convictions, but courts are competent to adjudge the acts men do under color of a constitutional right, such as that of freedom of speech or of the press or the free exercise of religion and to determine whether the claimed right is limited by other recognized powers, equally precious to mankind.¹³ So the mind and spirit of man remain forever free, while his actions rest subject to necessary accommodation to the competing needs of his fellows.

If all expression of religion or opinion, however, were subject to the discretion of authority, our unfettered dynamic thoughts or moral impulses might be made only colorless and sterile ideas. To give them life and force, the Constitution protects their use. No difference of view as to the importance of the freedoms of press or religion exist. They are "fundamental personal rights and liberties." *Schneider v. State*, 308 U. S. 147, 161. To proscribe the dissemination of doctrines or arguments which do not trans-

¹⁰ *Valentine v. Chrestensen*, No. 707, October Term 1941, slip opinion, p. 2; *Chaplinsky v. New Hampshire*, No. 255, October Term 1941, slip opinion, p. 3 and cases cited; *Minersville District v. Gobitis*, 310 U. S. 586, 594; *Cantwell v. Connecticut*, 310 U. S. 296, 304, 310; *Schneider v. State*, 308 U. S. 147, 165; *Hague v. C. I. O.*, 307 U. S. 496, 515-16; *De Jonge v. Oregon*, 299 U. S. 353, 364.

¹¹ *Chaplinsky v. New Hampshire*, No. 255, October Term 1941, slip opinion p. 2; *Cantwell v. Connecticut*, 310 U. S. 296, 303; *Schneider v. State*, 308 U. S. 147, 160; *Lovell v. Griffin*, 303 U. S. 444, 450; *Gitlow v. New York*, 268 U. S. 652.

¹² *Cox v. New Hampshire*, 312 U. S. 569, 574; *Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398, 435.

¹³ *Cantwell v. Connecticut*, 310 U. S. 296, 303; *Reynolds v. United States*, 98 U. S. 145, 166.

gress military or moral limits is to destroy the principal bases of democracy,—knowledge and discussion. One man, with views contrary to the rest of his compatriots, is entitled to the privilege of expressing his ideas by speech or broadside to anyone willing to listen or to read. Too many settled beliefs have in time been rejected to justify this generation in refusing a hearing to its own dissentients. But that hearing may be limited by action of the proper legislative body to times, places and methods for the enlightenment of the community which, in view of existing social and economic conditions, are not at odds with the preservation of peace and good order.

This means that the proponents of ideas cannot determine entirely for themselves the time and place and manner for the diffusion of knowledge or for their evangelism, any more than the civil authorities may hamper or suppress the public dissemination of facts and principles by the people.¹⁴ The ordinary requirements of civilized life compel this adjustment of interests. The task of reconciliation is made harder by the tendency to accept as dominant any contention supported by a claim of interference with the practice of religion or the spread of ideas. Believing as this nation has from the first that the freedoms of worship and expression are closely akin to the illimitable privileges of thought itself, any legislation affecting those freedoms is scrutinized to see that the interferences allowed are only those appropriate to the maintenance of a civilized society. The determination of what limitations may be permitted under such an abstract test rests with the legislative bodies, the courts, the executive and the people themselves guided by the experience of the past, the needs of revenue for law enforcement, the requirements and capacities of police protection, the dangers of disorder and other pertinent factors.

Upon the courts falls the duty of determining the validity of such enactments as may be challenged as unconstitutional by litigants.¹⁵ In dealing with these delicate adjustments this Court denies any place to administrative censorship of ideas or capricious approval of distributors. In *Lovell v. Griffin*, 303 U. S. 444, the requirement of permission from the city manager in-

¹⁴ *Cox v. New Hampshire*, 312 U. S. 569, 573, 576; *Cantwell v. Connecticut*, 310 U. S. 296, 306; *Schneider v. State*, 308 U. S. 147, 160.

¹⁵ Cf. *Schneider v. State*, *supra*, 161.

validated the ordinance, pp. 447 and 451; in *Schneider v. State*, that of a police officer, pp. 157 and 163. In the *Cantwell* case, the secretary of the public welfare council was to determine whether the object of charitable solicitation was worthy, p. 302. We held the requirement bad.¹⁶ Ordinances absolutely prohibiting the exercise of the right to disseminate information are, a fortiori, invalid.¹⁷

The differences between censorship and complete prohibition, either of subject matter or the individuals participating, upon the one hand, and regulation of the conduct of individuals in the time, manner and place of their activities upon the other, are decisive. "One who is a martyr to a principle . . . does not prove by his martyrdom that he has kept within the law," said Mr. Justice Cardozo concurring in *Hamilton v. Regents*, 293 U. S. 245, 268, which held that conscientious objection to military training would not excuse a student, during his enrollment, from attending required courses in that science.¹⁸ There is to be noted, too, a distinction between nondiscriminatory regulation of operations which are incidental to the exercise of religion or the freedom of speech or the press and those which are imposed upon the religious rite itself or the unmixed dissemination of information. Casual reflection verifies the suggestion that both teachers and preachers need to receive support for themselves as well as alms and benefactions for charity and the spread of knowledge. But when, as in these cases, the practitioners of these noble callings choose to utilize the vending of their religious books and tracts as a source of funds, the financial aspects of their transactions need not be wholly disregarded. To subject any religious or didactic group to a reasonable fee for their money-making activities does not require a finding that the licensed acts are purely commercial. It is enough that money is earned by the sale of articles. A book agent cannot escape a license requirement by a plea that it is a tax on knowledge. It would hardly be contended that the publication of newspapers is not subject to the

¹⁶ Cf. *Hague v. C. I. O.*, 307 U. S. 496, 516.

¹⁷ *Hague v. C. I. O.*, 307 U. S. 496, 501, 518, invalidates an ordinance forbidding any person to "distribute or cause to be distributed or strewn about any street or public place any newspapers, paper, periodical, book, magazine, circular, card, or pamphlet," p. 501; *Schneider v. State*, 308 U. S. 147, 162, holds similar prohibitory ordinances unconstitutional.

¹⁸ Cf. *City of Manchester v. Leiby*, 117 F. 2d 661, requirement of badge for street selling of books, papers or pamphlets.

usual governmental fiscal exactions, *Giragi v. Moore*, 301 U. S. 670; 48 Ariz. 33, 49 Ariz. 74, or the obligations placed by statutes on other business. *Associated Press v. Labor Board*, 301 U. S. 103, 130. The Constitution draws no line between a payment from gross receipts or a net income tax and a suitably calculated occupational license. Commercial advertising cannot escape control by the simple expedient of printing matter of public interest on the same sheet or handbill. *Valentine v. Chrestensen*, No. 707, October Term 1941. Nor does the fact that to the participants a formation in the streets is an "information march," and "one of their ways of worship," suffice to exempt such a procession from a city ordinance which, narrowly construed, required a license for such a parade.¹⁹

When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the state to charge reasonable fees for the privilege of canvassing. Careful as we may and should be to protect the freedoms safeguarded by the Bill of Rights, it is difficult to see in such enactments a shadow of prohibition of the exercise of religion or of abridgement of the freedom of speech or the press. It is prohibition and unjustifiable abridgement which is interdicted, not taxation. Nor do we believe it can be fairly said that because such proper charges may be expanded into unjustifiable abridgements they are therefore invalid on their face. The freedoms claimed by those seeking relief here are guaranteed against abridgement by the Fourteenth Amendment. Its commands protect their rights. The legislative power of municipalities must yield when abridgement is shown. Compare *Grosjean v. American Press Co.*, 297 U. S. 233, with *Giragi v. Moore*, 301 U. S. 670. If we were to assume, as is here argued, that the licensed activities involve religious rites, a different question would be presented. These are not taxes on free will offerings. But it is because we view these sales as partaking more of commercial than religious or educational transactions that we find the ordinances, as here presented, valid. A tax on religion or a tax on interstate commerce may alike be forbidden by the Constitution. It does not follow that licenses for selling Bibles or for manufacture of articles of general use, measured by extra-state sales, must fall. It may well be that the wisdom of American communities

¹⁹ *Cox v. New Hampshire*, 312 U. S. 569, 572, 573, 576.

will persuade them to permit the poor and weak to draw support from the petty sales of religious books without contributing anything for the privilege of using the streets and conveniences of the municipality. Such an exemption, however, would be a voluntary, not a constitutionally enforced, contribution.

In the ordinances of Casa Grande and Fort Smith, we have no discretionary power in the public authorities to refuse a license to any one desirous of selling religious literature. No censorship of the material which enters into the books or papers is authorized. No religious symbolism is involved such as was urged against the flag salute in *Minersville District v. Gobitis*, 310 U. S. 586. For us there is no occasion to apply here the principles taught by that opinion. Nothing more is asked from one group than from another which uses similar methods of propagation. We see nothing in the collection of a nondiscriminatory license fee, uncontested in amount, from those selling books or papers, which abridges the freedoms of worship, speech or press. Cf. *Grissjean v. American Press Co.*, 297 U. S. 233, 250. As to the claim that even small license charges, if valid, will impose upon the itinerant colporteur a crushing aggregate, it is plain that if each single fee is, as we assume, commensurate with the activities licensed, then though the accumulation of fees from city to city may in time bulk large, he will have enjoyed a correlatively enlarged field of distribution. Cf. *Coverdale v. Pipe Line Co.*, 303 U. S. 604, 612-613. The First Amendment does not require a subsidy in the form of fiscal exemption. *Giragi v. Moore*, *supra*. Accordingly the challenge to the Fort Smith and Casa Grande ordinances fails.

There is an additional contention by petitioner as to the Opelika ordinance. It is urged that since the licenses were revocable, arbitrarily, by the local authorities, note 3, *supra*, there can be no true freedom for petitioners in the dissemination of information because of the censorship upon their actions after the issuance of the license. But there has been neither application for nor revocation of a license. The complaint was bottomed on sales without a license. It was that charge against which petitioner claimed the protection of the Constitution. This issue he had standing to raise. *Smith v. Cahoon*, 283 U. S. 553, 562. From what has been said previously it follows that the objection to the unconstitutionality of requiring a license fails. There is no occasion, at this time, to pass on the validity of the revocation section, as it does not affect his present

defense. *Highland Farms Dairy v. Agnew*, 300 U. S. 608, 616; *Lehon v. City of Atlanta*, 242 U. S. 53, 56.

In *Lovell v. Griffin*, 303 U. S. 444, we held invalid a statute which placed the grant of a license within the discretion of the licensing authority. By this discretion, the right to obtain a license was made an empty right. Therefore the formality of going through an application was naturally not deemed a prerequisite to insistence on a constitutional right. Here we have a very different situation. A license is required that may properly be required. The fact that such a license, if it were granted, may subsequently be revoked does not necessarily destroy the licensing ordinance. The hazard of such revocation is much too contingent for us now to declare the licensing provisions to be invalid. *Lovell v. Griffin* has, in effect, held that discretionary control in the general area of free speech is unconstitutional. Therefore, the hazard that the license properly granted would be improperly revoked is far too slight to justify declaring the valid part of the ordinance, which is alone now at issue, also unconstitutional.

The judgments in Nos. 280, 314 and 966 are

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 280, 314 and 966.—OCTOBER TERM, 1941.

280	Roseo Jones, Petitioner, vs. City of Opelika.	} On Writ of Certiorari to the Supreme Court of the State of Alabama.
314	Lois Bowden and Zada Sanders, Petitioners, vs. City of Fort Smith, Arkansas.	} On Writ of Certiorari to the Supreme Court of the State of Arizona.
966	Charles Jobin, Appellant, vs. The State of Arizona.	} Appeal from the Supreme Court of the State of Ari- zona.

[June 8, 1942.]

Mr. Chief Justice STONE.

The First Amendment, which the Fourteenth makes applicable to the states, declares: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press". I think that the ordinance in each of these cases is on its face a prohibited invasion of the freedoms thus guaranteed, and that the judgment in each should be reversed.

The ordinance in the *Opelika* case should be held invalid on two independent grounds. One is that the annual tax in addition to the 50 cent "issuance fee" which the ordinance imposes is an unconstitutional restriction on those freedoms, for reasons which will presently appear. The other is that the requirement of a license for dissemination of ideas, when as here the license is revocable at will without cause and in the unrestrained discretion of administrative officers, is likewise an unconstitutional restraint on those freedoms.

The sole condition which the Opelika ordinance prescribes for grant of the license is payment of the designated annual tax and issuance fee. The privilege thus purchased, for the period of a year, is forthwith revocable in the unrestrained and unreviewable discretion of the licensing commission without cause and without notice or opportunity for a hearing. The case presents in its bald-

est form the question whether the freedoms which the Constitution purports to safeguard can be completely subjected to uncontrolled administrative action. Only recently this Court was unanimous in holding void on its face the requirement of a license for the distribution of pamphlets which was to be issued in the sole discretion of a municipal officer. *Lovell v. Griffin*, 303 U. S. 444, 451. The precise ground of our decision was that the ordinance made enjoyment of the freedom which the Constitution guarantees contingent upon the uncontrolled will of administrative officers. We declared:

"We think that the ordinance is invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship. The struggle for the freedom of the press was primarily directed against the power of the licensor. It was against that power that John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing.' And the liberty of the press became initially a right to publish 'without a license what formerly could be published only with one.' While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision."

That purpose cannot rightly be defeated by so transparent a subterfuge as the pronouncement that, while a license may not be required if its award is contingent upon the whim of an administrative officer, it may be if its retention and the enjoyment of the privilege which it purports to give is wholly contingent upon his whim. In either case enjoyment of the freedom is dependent upon the same contingency and the censorship is as effective in one as in the other. Nor is any palliative afforded by the assertion that the defendant's failure to apply for a license deprives him of standing to challenge the ordinance because of its revocation provision, by the terms of which retention of the license and exercise of the privilege may be cut off at any time without cause.

Indeed, the present ordinance is a more callous disregard of the constitutional right than that exhibited in *Lovell v. Griffin*, *supra*. There at least the defendant might have been given a license if he had applied for it. In any event he would not have been compelled to pay a money exaction for a license to exercise the privilege of free speech—a license which if granted in this case would have been wholly illusory. Here the defendant Jones was prohibited from distributing his pamphlets at all unless he paid in advance a

year's tax for the exercise of the privilege and subjected himself to termination of the license without cause, notice or hearing, at the will of city officials. To say that he who is free to withhold at will the privilege of publication exercises a power of censorship prohibited by the Constitution, but that he who has unrestricted power to withdraw the privilege does not, would be to ignore history and deny the teachings of experience, as well as to perpetuate the evils at which the First Amendment was aimed.

It is of no significance that the defendant did not apply for a license. As this Court has often pointed out, when a licensing statute is on its face a lawful exercise of regulatory power, it will not be assumed that it will be unlawfully administered in advance of an actual denial of application for the license. But here it is the prohibition of publication, save at the uncontrolled will of public officials, which transgresses constitutional limitations and makes the ordinance void on its face. The Constitution can hardly be thought to deny to one subjected to the restraints of such an ordinance the right to attack its constitutionality, because he has not yielded to its demands. *Lovell v. Griffin, supra*, 452-53; *Smith v. Cahoon*, 283 U. S. 553, 562. The question of standing to raise the issue in this case is indistinguishable from that in the *Lovell* case, where it was resolved in the only manner consistent with the First Amendment.

The separability provision of the Opelika ordinance¹ cannot serve, in advance of judicial decision by the state court, to separate those parts which are constitutionally applicable from those which are not. We have no means of knowing that the city would grant any license if the license could not be made revocable at will. The state court applied the ordinance as written. It did not rely or pass upon the effect to be given to the separability clause, or determine whether any effect was to be given to it. Until it has done so this Court—as we decided only last Monday—must determine the constitutional validity of the ordinance as it stands and as it stood when obedience to it was demanded and punishment for its violation inflicted. No. 782, *Skinner v. Oklahoma*, decided June 1, 1942; *Smith v. Cahoon, supra*, 563-64.

In all three cases the question presented by the record and fully argued here and below is whether the ordinances—which as ap-

¹ "Should any section, condition, or provision or any rate or amount scheduled as against any particular occupation exhibited in the foregoing schedule be held void or invalid, such invalidity shall not affect any other section, rate or provision of this license schedule."

plied penalize the defendants for not having paid the flat fee taxes levied—violate the freedom of speech, press, and religion guaranteed by the First and Fourteenth Amendments. Defendants' challenge to the ordinances, naming them, is a challenge to the substantial taxes which they impose, in specified amounts, and not to some tax of a different or lesser amount which some other ordinance might levy. In their briefs here they argue, as upon the records they are entitled to do, that the taxes are an unconstitutional burden on the right of free speech and free religion comparable to license taxes which this Court has often held to be an inadmissible burden on interstate commerce. They argue also that the cumulative effect of such taxes, in town after town throughout the country, would be destructive of freedom of the press for all persons except those financially able to distribute their literature without soliciting funds for the support of their cause.

While these are questions which have been studiously left unanswered by the opinion of the Court, it seems inescapable that an answer must be given before the convictions can be sustained. Decision of them cannot rightly be avoided now by asserting that the amount of the tax has not been put in issue; that the tax is "uncontested in amount" by the defendants, and can therefore be assumed by us to be "presumably appropriate", "reasonable", or "suitably calculated"; that it has not been proved that the burden of the tax is a substantial clog on the activities of the defendants, or that those who have defrayed the expense of their religious activities will not willingly defray the license taxes also. All these are considerations which would seem to be irrelevant to the question now before us—whether a flat tax, more than a nominal fee to defray the expenses of a regulatory license, can constitutionally be laid on a non-commercial, non-profit activity devoted exclusively to the dissemination of ideas, educational and religious in character, to those persons who consent to receive them.

Nor is the essential issue here disguised by the reiterated characterization of these exactions, not as taxes but as "fees"—a characterization to which the records lend no support. All these ordinances on their face purport to be an exercise of the municipality's taxing power. In none is there the slightest pretense by the taxing authority, or the slightest suggestion by the state court, that the "fee" is to defray expenses of the licensing system. The amounts of the "fees", without more, demonstrate that

such a contention is groundless. In No. 280, Opelika itself contends that the issue relates solely to its power to raise money for general revenue purposes, and the Supreme Court of Alabama referred to the levy as a "reasonable" "tax." The tax exacted by Opelika, on the face of the ordinance, is in addition to a 50 cent "issuance fee", which alone is presumably what the city deems adequate to defray the cost of administering the licensing system. Similarly in the *Fort Smith* and *Casa Grande* cases, the state courts sustained the ordinances as a tax, and nothing else. If this litigation has involved any controversy—and the state courts all seemed to think that it did—the controversy has been one solely relating to the power to tax, and not the power to collect a "fee" to support a licensing system which, as has already been indicated, has no regulatory purpose other than that involved in the raising of revenue.

This Court has often had occasion to point out that where the state may, as a regulatory measure, license activities which it is without constitutional authority to tax, it may charge a small or nominal fee sufficient to defray the expense of licensing, and similarly it may charge a reasonable fee for the use of its highways by interstate motor traffic which it cannot tax. Compare *Clark v. Paul Gray, Inc.*, 306 U. S. 583, 598-600, with *Ingels v. Morf*, 300 U. S. 290, and cases cited; see *Cox v. New Hampshire*, 312 U. S. 569, 576-77. But we are not concerned in these cases with a nominal fee for a regulatory license, which may be assumed for argument's sake to be valid. Here the licenses are not regulatory, save as the licenses conditioned upon payment of the tax may serve to restrain or suppress publication. None of the ordinances, if complied with, purports to or could control the time, place or manner of the distribution of the books and pamphlets concerned. None has any discernible relationship to the police protection or the good order of the community. The only condition and purpose of the licenses under all three ordinances is suppression of the specified distributions of literature in default of the payment of a substantial tax fixed in amount and measured neither by the extent of the defendants' activities under the license nor the amounts which they receive for and devote to religious purposes in the exercise of the licensed privilege. Opelika exacts a license fee for book agents of \$10 per annum and of \$5 per annum for transient distributors of books, in addition to a 50 cent "issuance fee" on each license. The Supreme Court of

Alabama found it unnecessary to determine whether both or only one of these taxes was payable by defendant Jones. The Fort Smith tax of \$25 a month or \$10 a week or \$2.50 a day is substantial in amount for transient distributors of literature of the character here involved; the Opelika exaction is even more onerous when applied against one who may be in the city for only a day or two; and the tax of \$25 per quarter exacted by the Casa Grande ordinance, adopted in a community having an adult population of less than 1,000 and applied to distributions of literature like the present, is prohibitive in effect.

In considering the effect of such a tax on the defendants' activities it is important to note that the state courts have applied levies obviously devised for the taxation of business employments—in the first case the "business or vocation" of "book agent"; in the second the business of peddling specified types of merchandise or "other articles"; in the third, the practice of the callings of "peddlers, transient merchants and venders"—to activities which concededly are not ordinary business or commercial transactions. As appears by stipulation or undisputed testimony, the defendants are Jehovah's Witnesses, engaged in spreading their religious doctrines in conformity to the teachings of St. Matthew, Matt. 10:11-14 and 24:14, by going from city to city, from village to village, and house to house, to proclaim them. After asking and receiving permission from the householder, they play to him phonograph records and tender to him books or pamphlets advocating their religious views. For the latter they ask payment of a nominal amount, two to five cents for the pamphlets and twenty-five cents for books, as a contribution to the religious cause which they seek to advance. But they distribute the pamphlets, and sometimes the books, gratis when the householder is unwilling or unable to pay for them. The literature is published for such distribution by non-profit charitable corporations organized by Jehovah's Witnesses. The funds collected are used for the support of the religious movement and no one derives a profit from the publication and distribution of the literature. In the *Opelika* case the defendant's activities were confined to distribution of literature and solicitation of funds in the public streets.

No one could doubt that taxation which may be freely laid upon activities not within the protection of the Bill of Rights could—when applied to the dissemination of ideas—be made the ready instrument for destruction of that right. Few would deny

that a license tax laid specifically on the privilege of disseminating ideas would infringe the right of free speech. For one reason among others, if the state may tax the privilege it may fix the rate of tax and, through the tax, control or suppress the activity which it taxes. *Magnano Co. v. Hamilton*, 292 U. S. 40, 45; *Grosjean v. American Press Co.*, 297 U. S. 233, 244-45. If the distribution of the literature had been carried on by the defendants without solicitation of funds, there plainly would have been no basis, either statutory or constitutional, for levying the tax. It is the collection of funds which has been seized upon to justify the extension, to the defendants' activities, of the tax laid upon business callings. But if we assume, despite our recent decision in *Schneider v. State*, 308 U. S. 147, 163, that the essential character of these activities is in some measure altered by the collection of funds for the support of a religious undertaking, still it seems plain that the operation of the present flat tax is such as to abridge the privileges which the defendants here invoke.

It lends no support to the present tax to insist that its restraint on free speech and religion is non-discriminatory because the same levy is made upon business callings carried on for profit, many of which involve no question of freedom of speech and religion and all of which involve commercial elements—lacking here—which for present purposes may be assumed to afford a basis for taxation apart from the exercise of freedom of speech and religion. The constitutional protection of the Bill of Rights is not to be evaded by classifying with business callings an activity whose sole purpose is the dissemination of ideas, and taxing it as business callings are taxed. The immunity which press and religion enjoy may sometimes be lost when they are united with other activities not immune. *Valentine v. Chrestensen*, 315 U. S. —. But here the only activities involved are the dissemination of ideas, educational and religious, and the collection of funds for the propagation of those ideas, which we have said is likewise the subject of constitutional protection. *Schneider v. State*, *supra*; *Cantwell v. Connecticut*, 310 U. S. 296, 304-07.

The First Amendment is not confined to safeguarding freedom of speech and freedom of religion against discriminatory attempts to wipe them out. On the contrary the Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms in a preferred position. Their commands are not restricted to cases where the protected privilege is sought out for attack. They extend

at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being used to control or suppress it.

Even were we to assume—what I do not concede—that there could be a lawful non-discriminatory license tax of a percentage of the gross receipts collected by churches and other religious orders in support of their religious work, cf. *Giragi v. Moore*, 301 U. S. 670, we have no such tax here. The tax imposed by the ordinances in these cases is more burdensome and destructive of the activity taxed than any gross receipts tax. The tax is for a fixed amount, unrelated to the extent of the defendants' activities or the receipts derived from them. It is thus the type of flat tax which, when applied to interstate commerce, has repeatedly been deemed by this Court to be prohibited by the commerce clause. See *McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 55-57, and cases cited; cf. *Best v. Maxwell*, 311 U. S. 454, 456. When applied as it is here to activities involving the exercise of religious freedom, its vice is emphasized in that it is levied and paid in advance of the activities taxed, and applied at rates well calculated to suppress those activities save only as others may volunteer to pay the tax. It requires a sizable out-of-pocket expense by someone who may never succeed in raising a penny in his exercise of the privilege which is taxed.

The defendants' activities, if taxable at all, are taxable only because of the funds which they solicit. But that solicitation is for funds for religious purposes, and the present taxes are in no way gauged to the receipts. The taxes are insupportable either as a tax on the dissemination of ideas or as a tax on the collection of funds for religious purposes. For on its face a flat license tax restrains in advance the freedom taxed and tends inevitably to suppress its exercise. The First Amendment prohibits all laws abridging freedom of press and religion, not merely some laws or all except tax laws. It is true that the constitutional guaranties of freedom of press and religion, like the commerce clause, make no distinction between fixed-sum taxes and other kinds. But that fact affords no excuse to courts, whose duty it is to enforce those guaranties, to close their eyes to the characteristics of a tax which render it destructive of freedom of press and religion.

We may lay to one side the Court's suggestion that a tax otherwise unconstitutional is to be deemed valid unless it is shown that there are none who, for religion's sake, will come forward to pay

the unlawful exaction. The defendants to whom the ordinances have been applied have not paid it and there is nothing in the Constitution to compel them to seek the charity of others to pay it before protesting the tax. It seems fairly obvious that if the present taxes, laid in small communities upon peripatetic religious propagandists, are to be sustained, a way has been found for the effective suppression of speech and press and religion despite constitutional guaranties. The very taxes now before us are better adapted to that end than were the stamp taxes which so successfully curtailed the dissemination of ideas by eighteenth century newspapers and pamphleteers, and which were a moving cause of the American Revolution. See Collett, *History of the Taxes on Knowledge*, vol. 1, c. 1; May, *Constitutional History of England*, 7th ed., vol. 2, p. 245; Hanson, *Government and the Press, 1695-1763*, pp. 7-14; Morison, *The English Newspaper, 1622-1932*, pp. 83-88; *Grosjean v. American Press Co.*, *supra*, 245-49. Vivid recollections of the effect of those taxes on the freedom of press survived to inspire the adoption of the First Amendment.

Freedom of press and religion, explicitly guaranteed by the Constitution, must at least be entitled to the same freedom from burdensome taxation which it has been thought that the more general phraseology of the commerce clause has extended to interstate commerce. Whatever doubts may be entertained as to this Court's function to relieve, unaided by Congressional legislation, from burdensome taxation under the commerce clause, see *Gwin, etc. Inc. v. Henneford*, 305 U. S. 434, 441, 446-55; *McCarroll v. Dixie Lines*, 309 U. S. 176, 184-85, it cannot be thought that that function is wanting under the explicit guaranties of freedom of speech, press and religion. In any case the flat license tax can hardly become any the less burdensome or more permissible, when levied on activities within the protection extended by the First and Fourteenth Amendments both to the orderly communication of ideas, educational and religious, to persons willing to receive them, see *Cantwell v. Connecticut*, *supra*, and to the practice of religion and the solicitation of funds in its support. *Schneider v. State*, *supra*.

In its potency as a prior restraint on publication the flat license tax falls short only of outright censorship or suppression. The more humble and needy the cause, the more effective is the suppression.

Mr. Justice BLACK, Mr. Justice DOUGLAS and Mr. Justice MURPHY join in this opinion.

SUPREME COURT OF THE UNITED STATES.

Nos. 280, 314 and 966.—OCTOBER TERM, 1941.

280 Roscoe Jones, Petitioner,
vs.
City of Opelika.

On Writ of Certiorari to the
Supreme Court of the State
of Alabama.

Lois Bowden and Zada Sanders,
Petitioners,
314 vs.
City of Fort Smith, Arkansas.

On Writ of Certiorari to the
Supreme Court of the State
of Arkansas.

966 Charles Jobin, Appellant,
vs.
The State of Arizona.

Appeal from the Supreme
Court of the State of Ari-
zona.

[June 8, 1942.]

Mr. Justice MURPHY, with whom the CHIEF JUSTICE, Mr. Justice BLACK, and Mr. Justice DOUGLAS concur, dissenting.

When a statute is challenged as impinging on freedom of speech, freedom of the press, or freedom of worship, those historic privileges which are so essential to our political welfare and spiritual progress, it is the duty of this Court to subject such legislation to examination, in the light of the evidence adduced, to determine whether it is so drawn as not to impair the substance of those cherished freedoms in reaching its objective. Ordinances that may operate to restrict the circulation or dissemination of ideas on religious or other subjects should be framed with fastidious care and precise language to avoid undue encroachment on these fundamental liberties. And the protection of the Constitution must be extended to all, not only to those whose views accord with prevailing thought but also to dissident minorities who energetically spread their beliefs. Being satisfied by the evidence that the ordinances in the cases now before us, as construed and applied in the state courts, impose a burden on the circulation and discussion of opinion and information in matters of religion, and therefore

violate the petitioners' rights to freedom of speech, freedom of the press, and freedom of worship in contravention of the Fourteenth Amendment, I am obliged to dissent from the opinion of the Court.

It is not disputed that petitioners, Jehovah's Witnesses, were ordained ministers preaching the gospel, as they understood it, through the streets and from house to house, orally and by playing religious records with the consent of the householder, and by distributing books and pamphlets setting forth the tenets of their faith. It does not appear that their motives were commercial, but only that they were evangelizing their faith as they saw it.

In No. 280 the trial court excluded as irrelevant petitioner's testimony that he was an ordained minister and that his activities on the streets of Opelika were in furtherance of his ministerial duties. The testimony of ten clergymen of Opelika that they distributed free religious literature in their churches, the cost of which was defrayed by voluntary contribution, and that they had never been forced to pay any license fee, was also excluded. It is admitted here that petitioner was a Jehovah's Witness and considered himself an ordained minister.

The Supreme Court of Arizona stated in No. 966 that appellant was "a regularly ordained minister of the denomination commonly known as Jehovah's Witnesses—going from house to house in the city of Casa Grande preaching the gospel, as he understood it, by means of his spoken word, by playing various religious records on a phonograph, with the approval of the householder, and by distributing printed books, pamphlets and tracts which set forth his views as to the meaning of the Bible. The method of distribution of these printed books, pamphlets and tracts was as follows: He first offered them for sale at various prices ranging from five to twenty-five cents each. If the householder did not desire to purchase any of them he then left a small leaflet summarizing some of the doctrines which he preached."

The facts were stipulated in No. 314. Each petitioner "claims to be an ordained minister of the gospel They do not engage in this work for any selfish reason but because they feel called upon to publish the news and preach the gospel of the kingdom to all the world as a witness before the end comes. . . . They believe that the only effective way to preach is to go from house to house and make personal contact with the people and distribute

¹ For convenience appellant in No. 966, petitioners in No. 314, and petitioner in No. 280 are herein collectively referred to as "petitioners".

to them books and pamphlets setting forth their views on Christianity". • Petitioners, "were going from house to house in the residential section within the city of Fort Smith . . . presenting to the residents of these houses various booklets, leaflets and periodicals setting forth their views on Christianity held by Jehovah's Witnesses." They solicited "a contribution of twenty-five cents for each book," but "these books in some instances are distributed free when the people wishing them are unable to contribute."

There is no suggestion in any of these three cases that petitioners were perpetrating a fraud, that they were demeaning themselves in an obnoxious manner, that their activities created any public disturbance or inconvenience, that private rights were contravened, or that the literature distributed was offensive to morals or created any "clear and present danger" to organized society.

The ordinance in each case is sought to be sustained as a system of non-discriminatory taxation of various businesses, professions, and vocations, including the distribution of books for which contributions are asked, for the sole purpose of raising revenue.² Any inclination to take the position that petitioners, who were proselytizing by distributing informative literature setting forth their religious tenets, and whose activities were wholly unrelated to any commercial purposes, were not within the purview of these occupational tax ordinances,³ is foreclosed by the decisions of the state courts below to the contrary. As so construed the ordinances in effect impose direct taxes on the dissemination of ideas and the distribution of literature, relating to and dealing with religious matters, for which a contribution is asked in an attempt to gain converts, because those were petitioners' activities. Such taxes have been held to violate the Fourteenth Amendment, *McConkey v. City of Fredericksburg*, 179 Va. 556, 19 S. E. 2d 682; *State v.*

² Respondent in No. 280 contends that the question presented "in no respect relates to regulatory or police power action of a municipal government, but is concerned only with the municipality's right to levy taxes".

The Supreme Court of Arizona stated in No. 966 that "the ordinance on its face is the ordinary occupational license tax ordinance".

³ Several courts have taken this position. *State ex rel. Semanaky v. Stark*, 196 La. 307, 199 S. 129; *People v. Finkelstein*, 170 N. Y. Misc. 188, 9 N. Y. S. 2d 941; *Thomas v. City of Atlanta*, 59 Ga. App. 520, 1 S. E. 2d 598; *State v. Meredith*, 197 S. C. 351, 15 S. E. 2d 678; *State ex rel. Hough v. Woodruff*, 147 Fla. 299, 2 So. 2d 577; *City of Cincinnati v. Mosier*, 61 Ohio App. 81, 22 N. E. 2d 418. Compare, *Gregg v. Smith*, 8 L. R. Q. B. (1872-3), p. 302; *City of Duncan v. Gairns*, 27 Canadian Cr. Cases 440; but see *Rex v. Stewart*, 53 Canadian Cr. Cases 24.

Greaves, 112 Vt. 222, 22 A. 2d 497; *City of Blue Island v. Kozul*, 379 Ill. 511, 41 N. E. 2d 515; and that should be the holding here.⁴

Freedom of Speech and Freedom of the Press.

In view of the recent decisions of this Court striking down acts which impair freedom of speech and freedom of the press no elaboration on that subject is now necessary. We have "unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares." *Valentine v. Chrestensen*, — U. S. —, No. 707 this Term, decided April 13, 1942. And as the distribution of pamphlets to spread information and opinion on the streets and from house to house for non-commercial purposes is protected from the prior restraint of censorship, *Lovell v. Griffin*, 303 U. S. 444; *Schneider v. Irvington*, 308 U. S. 147, so should it be protected from the burden of taxation.

The opinion of the Court holds that the amount of the tax is not before us and that a "nondiscriminatory license fee, presumably appropriate in amount, may be imposed upon these activities". Both of these holdings must be rejected.

Where regulation or infringement of the liberty of discussion and the dissemination of information and opinion are involved, there are special reasons for testing the challenged statute on its face. *Thornhill v. Alabama*, 310 U. S. 88, 96-98; and see *Lovell v. Griffin*, 303 U. S. 444, 452; *Drivers Union v. Meadowmoor Co.*, 312 U. S. 287, 297. That should be done *re*.⁵

Consideration of the taxes leads to but one conclusion—that they prohibit or seriously hinder the distribution of petitioners' religious literature. The opinion of the Court admits that all the taxes are "substantial". The \$25 quarterly tax of Casa Grande approaches prohibition. The 1940 population of that town was 1,545. With so few potential purchasers it would take a gifted

⁴ And see Rutledge, J., dissenting in *Busey v. District of Columbia*, — F. 2d —, decided April 15, 1942.

⁵ When the Opelika ordinance is considered on its face, there is an additional reason for its invalidity. The uncontrolled power of revocation lodged with the local authorities is but the converse of the system of prior licensing struck down in *Lovell v. Griffin*, 303 U. S. 444. Here, as there, the pervasive threat of censorship inherent in such a power vitiates the ordinance.

evangelist, indeed, in view of the antagonism generally encountered by Jehovah's Witnesses, to sell enough tracts at prices ranging from five to twenty-five cents to gross enough to pay the tax. Cf. *McConkey v. City of Fredericksburg*, 179 Va. 556, 19 S. E. 2d 682. While the amount is actually lower in Opelika⁶ and may be lower in Fort Smith in that it is possible to get a license⁷ for a short period,⁷ and while the circle of purchasers is wider in those towns,⁸ these exactions also place a heavy hand on petitioners' activities. The petitioners should not be subjected to such tribute.

But whatever the amount, the taxes are in reality taxes upon the dissemination of religious ideas, a dissemination carried on by the distribution of religious literature for religious reasons alone and not for personal profit. As such they place a burden on freedom of speech, freedom of the press, and the exercise of religion even if the question of amount is laid aside. Liberty of circulation is the very life blood of a free press, cf. *Lovell v. Griffin*, 303 U. S. 444, 452, and taxes on the circulation of ideas have a long history of misuse against freedom of thought.⁹ See *Grosjean v. American Press Co.*, 297 U. S. 233, 245-249. And taxes on circulation solely for the purpose of revenue were successfully resisted, prior to the adoption of the First Amendment, as interferences with freedom of the press.¹⁰ Surely all this was familiar knowledge to the framers of the Bill of Rights. We need not shut our eyes to the possibility that use may again be made of such taxes, either by discrimination in enforcement or otherwise, to suppress the unpalatable views of militant minorities such

⁶ \$5 or \$10, depending upon which section of the ordinance is held to apply.

⁷ \$2.50 per day, \$10 per week, and \$25 per month.

⁸ The 1940 population of Fort Smith was 36,584 and that of Opelika, 8,487.

⁹ The English Stamp Act of 1712, 10 Anne, c. 19, put a tax on newspapers and pamphlets to check what seemed to the Government to be "false and scandalous libels" and "the most horrid blasphemies against God and religion." This and subsequent enactments led to a long struggle in England for the repeal of these "taxes on knowledge" and the recognition of the freedom of the press. See Collett, *History of the Taxes on Knowledge* (1899); Place, *Taxes on Knowledge* (1831).

¹⁰ Stamp taxes for purely revenue purposes were successfully resisted in Massachusetts in 1757 and again in 1785 on the ground that they interfered with freedom of the press. See Duniway, *Freedom of the Press in Massachusetts* (1906), pp. 119-120, 136-137; Thomas, *History of Printing in America* (1810), vol. 2, pp. 267-268. The press also vigorously opposed the Stamp Act of 1765, 5 Geo. III, c. 12, which was also a revenue measure. See Duniway, *op. cit.*, p. 124; Thomas, *op. cit.*, pp. 189, 297, 322, 329, 350; Van Tyne, *Causes of the War of Independence* (1922), p. 160; 15 *Scottish Historical Review* 322, 326.

as Jehovah's Witnesses. See *McConkey v. City of Fredericksburg*, 179 Va. 556; 19 S. E. 2d 682. As the evidence excluded in No. 280 tended to show, no attempt was there made to apply the ordinance to ministers functioning in a more orthodox manner than petitioner.

Other objectionable features in addition to the factor of historical misuse exist. There is the unfairness present in any system of flat fee taxation, bearing no relation to the ability to pay. And there is the cumulative burden of many such taxes throughout the municipalities of the land, as the number of recent cases involving such ordinances abundantly demonstrates.¹¹ The activities of Jehovah's Witnesses are widespread, and the aggregate effect of numerous exactions, no matter how small, can conceivably force them to choose between refraining from attempting to recoup part of the cost of their literature, or else paying out large sums in taxes. Either choice hinders and may even possibly put an end to their activities. There is no basis, other than a refusal to consider the characteristics of taxes such as these, for any assumption that such taxes are "commensurate with the activities licensed". Nor is there any assurance that "a correlatively enlarged field of distribution" will insure sufficient proceeds even to meet such exactions, let alone leaving any residue for the continuation of petitioners' evangelization.

Freedom of speech, freedom of the press, and freedom of religion all have a double aspect—freedom of thought, and freedom of action. Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind. But even an aggressive mind is of no missionary value unless there is freedom of action, freedom to communicate its message to others by speech and writing. Since in any form of action there is a possibility of collision with the rights of others, there can be no doubt that this freedom to act is not absolute but qualified, being subject to regulation in the public interest

¹¹ In addition to the instant cases see *City of Cincinnati v. Mosier*, 61 Ohio App. 81, 22 N. E. 2d 418; *State v. Meredith*, 197 S. C. 351, 15 S. E. 2d 678; *Thomas v. City of Atlanta*, 59 Ga. App. 520, 1 S. E. 2d 598; *Commonwealth v. Reid*, 20 A. 2d (Pa.) 841; *People v. Banks*, 168 N. Y. Misc. 515, 6 N. Y. S. 2d 41; *Cook v. City of Harrison*, 180 Ark. 546, 21 S. W. 2d 966; *State v. Greaves*, 112 Vt. 222, 22 A. 2d 497; *Busey v. District of Columbia*, — F. 2d —; *McConkey v. City of Fredericksburg*, 179 Va. 556, 19 S. E. 2d 682; *City of Blue Island v. Kozul*, 379 Ill. 511, 41 N. E. 2d 515; *State ex rel. Semansky v. Stark*, 196 La. 307, 199 S. 129; *People v. Finkelstein*, 170 N. Y. Misc. 188, 9 N. Y. S. 2d 941; *State ex rel. Hough v. Woodruff*, 147 Fla. 299, 2 So. 2d 577; *Borchert v. City of Ranger*, 42 F. Supp. 577.

which does not unduly infringe the right. However, there is no assertion here that the ordinances were regulatory, but if there were such a claim, they still should not be sustained. No abuses justifying regulation are advanced and the ordinances are not narrowly and precisely drawn to deal with actual, or even hypothetical evils, while at the same time preserving the substance of the right. Cf. *Thornhill v. Alabama*, 310 U. S. 88, 105; *Cantwell v. Connecticut*, 310 U. S. 296, 311. They impose a tax on the dissemination of information and opinion anywhere within the city limits, whether on the streets or from house to house. "As we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised elsewhere." *Schneider v. Irvington*, 308 U. S. 147, 163. These taxes abridge that liberty.

It matters not that petitioners asked contributions for their literature. Freedom of speech and freedom of the press cannot and must not mean freedom only for those who can distribute their broadsides without charge. There may be others with messages more vital but purses less full, who must seek some reimbursement for their outlay or else forego passing on their ideas. The pamphlet, a historic weapon against oppression,¹² *Lovell v. Griffin*, 303 U. S. 444, 452, is today the convenient vehicle of those with limited resources because newspaper space and radio time are expensive and the cost of establishing such enterprises great. If freedom of speech and freedom of the press are to have any concrete meaning, people seeking to distribute information and opinion, to the end only that others shall have the benefit thereof, should not be taxed for circulating such matter. It is unnecessary to consider now the validity of such taxes on commercial enterprises engaged in the dissemination of ideas. Cf. *Valentine v. Chrestensen*, No. 707 this Term, decided April 13, 1942; *Giragi v. Moore*, 301 U. S. 670. Petitioners were not engaged in a traffic for profit. While the courts below held their activities were covered by the ordinances, it is clear that they were seeking only to further their religious convictions by preaching the gospel to others.

¹²The pamphlets of Paine were not distributed gratuitously. See Introduction to Paine's Political Writings (London, 1909), pp. 3, 5.

Pamphlets were extensively used in the struggle for religious freedom. See Greene, *The Development of Religious Liberty in Connecticut* (1905), pp. 282-283, 299-301.

The exercise, without commercial motives, of freedom of speech, freedom of the press, or freedom of worship are not proper sources of taxation for general revenue purposes. In dealing with a permissible regulation of these freedoms and the fee charged in connection therewith, we emphasized the fact that the fee "was not a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order", and stated only that, "There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated." *Cox v. New Hampshire*, 312 U. S. 569, 577. The taxes here involved are ostensibly for revenue purposes; they are not regulatory fees. Respondents do not show that the instant activities of Jehovah's Witnesses create special problems causing a drain on the municipal coffers, or that these taxes are commensurate with any expenses entailed by the presence of the Witnesses. In the absence of such a showing I think no tax whatever can be levied on petitioners' activities in distributing their literature or disseminating their ideas. If the guaranties of freedom of speech and freedom of the press are to be preserved, municipalities should not be free to raise general revenue by taxes on the circulation of information and opinion in non-commercial causes; other sources can be found, the taxation of which will not choke off ideas. Taxes such as the instant ones violate petitioners' right to freedom of speech and freedom of the press, protected against state invasion by the Fourteenth Amendment.

Freedom of Religion.

Under the foregoing discussion of freedom of speech and freedom of the press any person would be exempt from taxation upon the act of distributing information or opinion of any kind, whether political, scientific, or religious in character, when done solely in an effort to spread knowledge and ideas, with no thought of commercial gain. But there is another, and perhaps more precious reason why these ordinances cannot constitutionally apply to petitioners. Important as free speech and a free press are to a free government and a free citizenry, there is a right even more dear to many individuals—the right to worship their Maker according to their needs and the dictates of their souls and to carry their message or their gospel to every living creature. These ordinances infringe that right, which is also protected by the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U. S. 296.

Petitioners were itinerant ministers going through the streets and from house to house in different communities, preaching the

gospel by distributing booklets and pamphlets setting forth their views of the Bible and the tenets of their faith. While perhaps not so orthodox as the oral sermon, the use of religious books is an old, recognized and effective mode of worship and means of proselytizing.¹³ For this petitioners were taxed. The mind rebels at the thought that a minister of any of the old established churches could be made to pay fees to the community before entering the pulpit. These taxes on petitioners' efforts to preach the "news of the Kingdom" should be struck down because they burden petitioners' right to worship the Deity in their own fashion and to spread the gospel as they understand it. There is here no contention that their manner of worship gives rise to conduct which calls for regulation, and these ordinances are not aimed at any such practices.

One need only read the decisions of this and other courts in the past few years to see the unpopularity of Jehovah's Witnesses and the difficulties put in their path because of their religious beliefs. An arresting parallel exists between the troubles of Jehovah's Witnesses and the struggles of various dissentient groups in the American colonies for religious liberty which culminated in the Virginia Statute for Religious Freedom,¹⁴ the Northwest Ordinance of 1787,¹⁵ and the First Amendment. In most of the colonies there was an established church, and the way of the dissenter was hard. All sects, including Quaker, Methodist, Baptist, Episcopalian, Separatist, Rogerine, and Catholic, suffered.¹⁶ Many of the non-conforming ministers were itinerants, and measures were adopted to curb their unwanted activities. The books of certain denominations were banned.¹⁷ Virginia and Connecticut had bur-

¹³ See, The Volumes of the American Tract Society (1848), pp. 15-16, 24; Home Evangelization (1850), pp. 70-74; Lee, History of the Methodists (1810), p. 48.

¹⁴ Adopted in 1785 through the efforts of Jefferson and Madison. Virginia Code of 1930, sec. 34.

¹⁵ ARTICLE I. No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments in the said territory.

¹⁶ See Works of Thomas Jefferson (1861), vol. VIII, pp. 398-402. (Notes on Virginia, Query XVII); Cobb, Rise of Religious Liberty in America (1902); Little, Imprisoned Preachers and Religious Liberty in Virginia (1938); Lee, History of the Methodists (1810), pp. 62-74; Greene, The Development of Religious Liberty in Connecticut (1905), pp. 158-180; Guilday, Life and Times of John Carroll (1922), vol. 1, Chapters V and VIII.

¹⁷ Jefferson, *op. cit.*; Greene, *op. cit.*, p. 165.

densome licensing requirements.¹⁸ Cf. *Lovell v. Griffin*, 303 U. S. 444; *Schneider v. Irvington*, 308 U. S. 147; *Cantwell v. Connecticut*, 310 U. S. 296. Other states required oaths before one could preach which many ministers could not conscientiously take.¹⁹ Cf. *Reid v. Borough of Brookville, Pa.*, 39 F. Supp. 30; *Kennedy v. City of Moscow*, 39 F. Supp. 26. Research reveals no attempt to control or persecute by the more subtle means of taxing the function of preaching, or even any attempt to tap it as a source of revenue.²⁰

By applying these occupational taxes to petitioners' non-commercial activities, respondents now tax sincere efforts to spread religious beliefs, and a heavy burden falls upon a new set of itinerant zealots, the Witnesses. That burden should not be allowed to stand, especially if, as the excluded testimony in No. 280 indicates, the accepted clergymen of the town can take to their pulpits and distribute their literature without the impact of taxation. Liberty of conscience is too full of meaning for the individuals in this nation to permit taxation to prohibit or substantially impair the spread of religious ideas, even though they are controversial and run counter to the established notions of a community. If this Court is to err in evaluating claims that freedom of speech, freedom of the press, and freedom of religion have been invaded, far better that it err in being overprotective of these precious rights.

¹⁸ Little, *op. cit.*, pp. 11-13, 67-69; Greene, *op. cit.*, pp. 243, 262-263, 358; Cobb, *op. cit.*, pp. 98, 104, 358; Wright, *Hawkers and Walkers in Early America* (1927), Chapter X; Baldwin, *The New England Clergy and the Revolution* (1928), p. 59.

¹⁹ *The Journal of the Rev. Francis Asbury*, (1821), vol. 1, pp. 208, 253; Lee, *op. cit.*, pp. 62-74.

²⁰ The Stamp Act of 1765 exempted "any books containing only matters of devotion or piety". MacDonald, *Documentary Source Book of American History* (3d ed., 1934), p. 128.

SUPREME COURT OF THE UNITED STATES.

Nos. 280, 314 and 966.—OCTOBER TERM, 1941.

280	Rosco Jones, Petitioner, vs. City of Opelika.	} On Writ of Certiorari to the Supreme Court of the State of Alabama.
314	Lois Bowden and Zada Sanders, Petitioners, vs. City of Fort Smith, Arkansas.	} On Writ of Certiorari to the Supreme Court of the State of Arkansas.
966	Charles Jobin, Appellant, vs. The State of Arizona.	} Appeal from the Supreme Court of the State of Ari- zona.

[June 8, 1942.]

Mr. Justice BLACK, Mr. Justice DOUGLAS, Mr. Justice MURPHY.

The opinion of the Court sanctions a device which in our opinion suppresses or tends to suppress the free exercise of a religion practiced by a minority group. This is but another step in the direction which *Minersville School District v. Gobitis*, 310 U. S. 586, took against the same religious minority and is a logical extension of the principles upon which that decision rested. Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided. Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be. The First Amendment does not put the right freely to exercise religion in a subordinate position. We fear, however, that the opinions in these and in the *Gobitis* case do exactly that.

pp 11 & 12 Reed f. dissent.

SUPREME COURT OF THE UNITED STATES.

Nos. 280, 314, 966.—OCTOBER TERM, 1941.

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966	Charles Jobin, Appellant, vs. The State of Arizona.	}	On Appeal from the Su- preme Court of the State of Arizona.

[May 3, 1943.]

Per Curiam: The judgments in these cases were affirmed at the October Term, 1941. 316 U. S. 584. Because the issues in all three cases were of the same character as those brought before us in other cases by applications for certiorari at the present term, we ordered a reargument and heard these cases together with Nos. 480-487, *Murdock et al. v. Pennsylvania*. For the reasons stated in the opinion of the Court in Nos. 480-487, decided this day, and in the dissenting opinions filed in the present cases after the argument last term, the Court is of opinion that the judgment in each case should be reversed. The judgments of this Court heretofore entered in these cases are therefore vacated, and the judgments of the state courts are reversed.

So ordered.

SUPREME COURT OF THE UNITED STATES.

Nos. 480-487.—OCTOBER TERM, 1942.

480 Robert Murdock, Jr., Petitioner,
vs.
Commonwealth of Pennsylvania (City of Jeannette).

481 Anna Perlsich, Petitioner,
vs.
Commonwealth of Pennsylvania (City of Jeannette).

482 Willard L. Mowder, Petitioner,
vs.
Commonwealth of Pennsylvania (City of Jeannette).

483 Charles Seders, Petitioner,
vs.
Commonwealth of Pennsylvania (City of Jeannette).

484 Robert Lamborn, Petitioner,
vs.
Commonwealth of Pennsylvania (City of Jeannette).

485 Anthony Maltezos, Petitioner,
vs.
Commonwealth of Pennsylvania (City of Jeannette).

486 Anastasia Tzanes, Petitioner,
vs.
Commonwealth of Pennsylvania (City of Jeannette).

487 Elaine Tzanes, Petitioner,
vs.
Commonwealth of Pennsylvania (City of Jeannette).

On Writs of Certiorari
to the Superior Court
of the Commonwealth
of Pennsylvania.

[May 3, 1943.]

Mr. Justice DOUGLAS delivered the opinion of the Court.

The City of Jeannette, Pennsylvania, has an ordinance, some forty years old, which provides in part:

"That all persons canvassing for or soliciting within said Borough, orders for goods, paintings, pictures, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the Burgess a license to transact said business and shall pay to the Treasurer of said Borough therefore the following sums according to the time for which said license shall be granted.

"For one day \$1.50, for one week seven dollars (\$7.00), for two weeks twelve dollars (\$12.00), for three weeks twenty dollars (\$20.00), provided that the provisions of this ordinance shall not apply to persons selling by sample to manufacturers or licensed merchants or dealers doing business in said Borough of Jeannette."

Petitioners are "Jehovah's Witnesses". They went about from door to door in the City of Jeannette distributing literature and soliciting people to "purchase" certain religious books and pamphlets, all published by the Watch Tower Bible & Tract Society.¹ The "price" of the books was twenty-five cents each, the "price" of the pamphlets five cents each.² In connection with these activities petitioners used a phonograph³ on which they played a record expounding certain of their views on religion. None of them obtained a license under the ordinance. Before they were arrested each had made "sales" of books. There was evidence that it was their practice in making these solicitations to request a "contribution" of twenty-five cents each for the books and five cents each for the pamphlets but to accept lesser sums or even to donate the volumes in case an interested person was without funds. In the present case some donations of pamphlets were made when books were purchased. Petitioners were convicted and fined for violation of the ordinance. Their judgments of conviction were sustained by the Superior Court of Pennsylvania, 149 Pa. Super. Ct. 175, 27 Atl. 2d 666, against their contention that the ordinance deprived them of the freedom of speech, press, and religion guaranteed by the First Amendment. Petitions for leave to appeal to the Supreme Court of Pennsylvania were denied. The cases are here on petitions for writs of certiorari which we granted along with the petitions for rehearing of *Jones v. Opelika*, 316 U. S. 584, and its companion cases.

The First Amendment, which the Fourteenth makes applicable to the states, declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press" It could hardly be denied that a tax laid specifically on the exercise of those freedoms would be unconstitutional. Yet the license tax imposed by this ordinance is in substance just that.

¹ Two religious books—*Salvation and Creation*—were sold. Others were offered in addition to the Bible. The Watch Tower Bible & Tract Society is alleged to be a non-profit charitable corporation.

² Petitioners paid three cents each for the pamphlets and, if they devoted only their spare time to the work, twenty cents each for the books. Those devoting full time to the work acquired the books for five cents each. There was evidence that some of the petitioners paid the difference between the sales price and the cost of the books to their local congregations which distributed the literature.

³ Purchased along with the record from the Watch Tower Bible & Tract Society.

Petitioners spread their interpretations of the Bible and their religious beliefs largely through the hand distribution of literature by full or part time workers.⁴ They claim to follow the example of Paul, teaching "publicly, and from house to house." Acts 20:20. They take literally the mandate of the Scriptures, "Go ye into all the world, and preach the gospel to every creature." Mark 16:15. In doing so they believe that they are obeying a commandment of God.

The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses.⁵ It has been a potent force in various religious movements down through the years.⁶ This form of evangelism is utilized today on a large scale by various religious sects whose colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith.⁷ It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of religious activity occupies the same high estate under the First Amendment as do worship

⁴ The nature and extent of their activities throughout the world during the years 1939 and 1940 are to be found in the 1941 Yearbook of Jehovah's Witnesses, pp. 62-243.

⁵ Palmer, *The Printing Press and the Gospel* (1912).

⁶ White, *The Colporteur Evangelist* (1930); *Home Evangelization* (1850); Edwards, *The Romance of the Book* (1932) c. V; 12 *Biblical Repository* (1844) Art. VIII; 16 *The Sunday Magazine* (1887) pp. 43-47; 3 *Meliora* (1861) pp. 311-319; Felice, *Protestants of France* (1853) pp. 53, 513; 3 *D'Aubigne, History of The Reformation* (1849) pp. 103, 152, 436-437; Report of Colportage in Virginia, North Carolina & South Carolina, American Tract Society (1855). An early type of colporteur was depicted by John Greenleaf Whittier in his legendary poem, *The Vaudois Teacher*. And see, Wylie, *History of the Waldenses*.

⁷ The General Conference of Seventh-Day Adventists who filed a brief *amicus curiae* on the reargument of *Jones v. Opelika* has given us the following data concerning their literature ministry: This denomination has 83 publishing houses throughout the world issuing publications in over 200 languages. Some 9,256 separate publications were issued in 1941. By printed and spoken word the Gospel is carried into 412 countries in 824 languages. 1942 Year Book, p. 287. During December, 1941 a total of 1018 colporteurs operated in North America. They delivered during that month \$97,997.19 worth of gospel literature and for the whole year of 1941 a total of \$790,610.36—an average per person of about \$65 per month. Some of these were students and temporary workers. Colporteurs of this denomination receive half of their collections from which they must pay their traveling and living expenses. Colporteurs are specially trained and their qualifications equal those of preachers. In the field each worker is under the supervision of a field missionary secretary to whom a weekly report is made. After fifteen years of continuous service each colporteur is entitled to the same pension as retired ministers. And see Howell, *The Great Advent Movement* (1935), pp. 72-75.

in the churches and preaching from the pulpits. It has the same claim to protection as the more orthodox and conventional exercises of religion. It also has the same claim as the others to the guarantees of freedom of speech and freedom of the press.

The integrity of this conduct or behavior as a religious practice has not been challenged. Nor do we have presented any question as to the sincerity of petitioners in their religious beliefs and practices, however misguided they may be thought to be. Moreover, we do not intimate or suggest in respecting their sincerity that any conduct can be made a religious rite and by the zeal of the practitioners swept into the First Amendment. *Reynolds v. United States*, 98 U. S. 145, 161-167, and *Davis v. Beason*, 133 U. S. 333 denied any such claim to the practice of polygamy and bigamy. Other claims may well arise which deserve the same fate. We only hold that spreading one's religious beliefs or preaching the Gospel through distribution of religious literature and through personal visitations is an age-old type of evangelism with as high a claim to constitutional protection as the more orthodox types. The manner in which it is practiced at times gives rise to special problems with which the police power of the states is competent to deal. See for example *Cox v. New Hampshire* 312 U. S. 569 and *Chaplinsky v. New Hampshire*, 315 U. S. 568. But that merely illustrates that the rights with which we are dealing are not absolutes. *Schneider v. State*, 308 U. S. 147, 160-161. We are concerned, however, in these cases merely with one narrow issue. There is presented for decision no question whatsoever concerning punishment for any alleged unlawful acts during the solicitation. Nor is there involved here any question as to the validity of a registration system for colporteurs and other solicitors. The cases present a single issue—the constitutionality of an ordinance which as construed and applied requires religious colporteurs to pay a license tax as a condition to the pursuit of their activities.

The alleged justification for the exaction of this license tax is the fact that the religious literature is distributed with a solicitation of funds. Thus it was stated in *Jones v. Opelika*, *supra*, p. 597, that when a religious sect uses "ordinary commercial methods of sales of articles to raise propaganda funds", it is proper for the state to charge "reasonable fees for the privilege of canvassing". Situations will arise where it will be difficult to determine whether a particular activity is religious or purely commercial. The distinction at times is vital. As we stated only the other day in

Jamison v. Texas, 318 U. S. —, "The state can prohibit the use of the street for the distribution of purely commercial leaflets, even though such leaflets may have 'a civil appeal, or a moral platitude' appended. *Valentine v. Chrestensen*, 316 U. S. 52, 55. They may not prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes." But the mere fact that the religious literature is "sold" by itinerant preachers rather than "donated" does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books. The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. It is plain that a religious organization needs funds to remain a going concern. But an itinerant evangelist however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray his expenses or to sustain him. Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way. As we have said, the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult. On this record it plainly cannot be said that petitioners were engaged in a commercial rather than a religious venture. It is a distortion of the facts of record to describe their activities as the occupation of selling books and pamphlets. And the Pennsylvania court did not rest the judgments of conviction on that basis, though it did find that petitioners "sold" the literature. The Supreme Court of Iowa in *State v. Mead*, 230 Ia. 1217, described the selling activities of members of this same sect as "merely incidental and collateral" to their "main object which was to preach and publicize the doctrines of their order." And see *State v. Meredith*, 197 S. C. 351; *People v. Barber*, 289 N. Y. 378, 385-386. That accurately summarizes the present record.

We do not mean to say that religious groups and the press are free from all financial burdens of government. See *Grosjean v. American Press Co.*, 297 U. S. 233, 250. We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed by the City of Jeannette is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. *Magnano Co. v. Hamilton*, 292 U. S. 40, 44-45, and cases cited. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse. Spreading religious beliefs in this ancient and honorable manner would thus be denied the needy. Those who can deprive religious groups of their *colporteurs* can take from them a part of the vital power of the press which has survived from the Reformation.

It is contended, however, that the fact that the license tax can suppress or control this activity is unimportant if it does not do so. But that is to disregard the nature of this tax. It is a license tax—a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the federal constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce (*McGoldrick v. Berwind-White Co.*, 309 U. S. 33, 56-58), although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory. *Id.*, p. 47 and cases cited. A license tax applied to activities guaranteed by the First Amendment would have the same destructive effect. It is true that the First Amendment, like the commerce clause, draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes. But that is no reason why we should shut our eyes to the nature of the tax and its destructive influence. The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down. *Lovell v. Griffin*, 303 U. S.

444; *Schneider v. State*, *supra*; *Captwell v. Connecticut*, 310 U. S. 296, 306; *Largent v. Texas*, 218 U. S. —; *Jamison v. Texas*, *supra*. It was for that reason that the dissenting opinions in *Jones v. Opelika*, *supra*, stressed the nature of this type of tax. 316 U. S. pp. 607-609, 620, 623. In that case, as in the present ones, we have something very different from a registration system under which those going from house to house are required to give their names, addresses and other marks of identification to the authorities. In all of these cases the issuance of the permit or license is dependent on the payment of a license tax. And the license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question.⁸ It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise. That is almost uniformly recognized as the inherent vice and evil of this flat license tax. As stated by the Supreme Court of Illinois in a case involving this same sect and an ordinance similar to the present one, a person cannot be compelled "to purchase, through a license fee or a license tax, the privilege freely granted by the constitution."⁹ *Blue Island v. Kozul*, 379 Ill. 511, 519. So it may not be said that proof is lacking that these license taxes either separately or cumulatively have restricted or are likely to restrict petitioners' religious activities. On their face they are a restriction of the free exercise of those freedoms which are protected by the First Amendment.

⁸ The constitutional difference between such a regulatory measure and a tax on the exercise of a federal right has long been recognized. While a state may not exact a license tax for the privilege of carrying on interstate commerce (*McGoldrick v. Berwind-White Co.*, *supra*, pp. 56-58) it may, for example, exact a fee to defray the cost of purely local regulations in spite of the fact that those regulations incidentally affect commerce. "So long as they do not impede the flow of commerce and are not made the subject of regulation by Congress they are not forbidden." *Clyde Mallory Lines v. Alabama*, 296 U. S. 261, 267, and cases cited. And see *South Carolina v. Barnwell Bros., Inc.*, 303 U. S. 177, 185-188.

⁹ That is the view of most state courts which have passed on the question. *McConkey v. Fredericksburg*, 179 Va. 555; *State v. Greaves*, 112 Vt. 222; *People v. Banks*, 168 Misc. 515. *Contra*: *Cook v. Harrison*, 180 Ark. 546.

8. *Murdock, Jr. vs. Commonwealth of Pa., City of Jeannette.*

The taxes imposed by this ordinance can hardly help but be as severe and telling in their impact on the freedom of the press and religion as the "taxes on knowledge" at which the First Amendment was partly aimed: *Grosjean v. American Press Co.*, *supra*, pp. 244-249. They may indeed operate even more subtly. Itinerant evangelists moving throughout a state or from state to state would feel immediately the cumulative effect of such ordinances as they become fashionable. The way of the religious dissenter has long been hard. But if the formula of this type of ordinance is approved, a new device for the suppression of religious minorities will have been found. This method of disseminating religious beliefs can be crushed and closed but by the sheer weight of the toll or tribute which is exacted town by town, village by village. The spread of religious ideas through personal visitations by the literature ministry of numerous religious groups would be stopped.

The fact that the ordinance is "nondiscriminatory" is immaterial. The protection afforded by the First Amendment is not so restricted. A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.

It is claimed, however, that the ultimate question in determining the constitutionality of this license tax is whether the state has given something for which it can ask a return. That principle has wide applicability. *State Tax Commission v. Aldrich*; 316 U. S. 174, and cases cited. But it is quite irrelevant here. This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. The privilege in question exists apart from state authority. It is guaranteed the people by the federal constitution.

Considerable emphasis is placed on the kind of literature which petitioners were distributing — its provocative, abusive, and ill-mannered character and the assault which it makes on our established churches and the cherished faiths of many of us. See *Douglas v. City of Jeannette*, concurring opinion, decided this day. But those considerations are no justification for the license tax which the ordinance imposes. Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanc-

tioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights.

Jehovah's Witnesses are not "above the law". But the present ordinance is not directed to the problems with which the police power of the state is free to deal. It does not cover, and petitioners are not charged with, breaches of the peace. They are pursuing their solicitations peacefully and quietly. Petitioners, moreover, are not charged with or prosecuted for the use of language which is obscene, abusive, or which incites retaliation. Cf. *Chaplinsky v. New Hampshire, supra*. Nor do we have here, as we did in *Cox v. New Hampshire, supra*, and *Chaplinsky v. New Hampshire, supra*, state regulation of the streets to protect and insure the safety, comfort, or convenience of the public. Furthermore, the present ordinance is not narrowly drawn to safeguard the people of the community in their homes against the evils of solicitations. See *Cantwell v. Connecticut, supra*, 306. As we have said, it is not merely a registration ordinance calling for an identification of the solicitors so as to give the authorities some basis for investigating strangers coming into the community. And the fee is not a nominal one, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors. See *Cox v. New Hampshire, supra*, pp. 576-577. Nor can the present ordinance survive if we assume that it has been construed to apply only to solicitation from house to house.¹⁰ The ordinance is not narrowly drawn to prevent or control abuses or evils arising from that activity. Rather, it sets aside the residential areas as a prohibited zone, entry of which is denied petitioners unless the tax is paid. That restraint and one which is city wide in scope (*Jones v. Opelika*) are different only in degree. Each is an abridgment of freedom of press and a restraint on the free exercise of religion. They stand or fall together.

The judgment in *Jones v. Opelika* has this day been vacated. Freed from that controlling precedent, we can restore to their high, constitutional position the liberties of itinerant evangelists

¹⁰ The Pennsylvania Superior Court stated that the ordinance has been "enforced" only to prevent petitioners from canvassing "from door to door and house to house" without a license and not to prevent them from distributing their literature on the streets. 149 Pa. Super. Ct., p. 184.

10 *Murdock Jr. vs. Commonwealth of Pa., City of Jeannette.*

who disseminate their religious beliefs and the tenets of their faith through distribution of literature. The judgments are reversed and the causes are remanded to the Pennsylvania Superior Court for proceedings not inconsistent with this opinion.

Reversed.

The dissent in *Jones v. City of Opelika* printed at page — covers these cases also.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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of the Commonwealth
of Pennsylvania.

[May 3, 1943.]

Mr. Justice REED, dissenting.

These cases present for solution the problem of the constitutionality of certain municipal ordinances levying a tax for the production of revenue on the sale of books and pamphlets in the

streets or from door to door. Decisions sustaining the particular ordinances were entered in the three cases first listed at the last term of this Court. In that opinion the ordinances were set out and the facts and issues stated. *Jones v. Opelika*, 316 U. S. 584. A rehearing has been granted. The present judgments vacate the old and invalidate the ordinances. The eight cases of this term involve canvassing from door to door only under similar ordinances, which are in the form stated in the Court's opinion. By a *per curiam* opinion of this day, the Court affirms its acceptance of the arguments presented by the dissent of last term in *Jones v. Opelika*. The Court states its position anew in the *Jeanette* cases.

This dissent does not deal with an objection which theoretically could be made in each case, to wit, that the licenses are so excessive in amount as to be prohibitory. This matter is not considered because that defense is not relied upon in the pleadings, the briefs or at the bar. No evidence is offered to show the amount is oppressive. An unequal tax, levied on the activities of distributors of informatory publications, would be a phase of discrimination against the freedom of speech, press or religion. Nor do we deal with discrimination against the petitioners, as individuals or as members of the group, calling themselves Jehovah's witnesses. There is no contention in any of these cases that such discrimination is practiced in the application of the ordinances. Obviously an improper application by a city, which resulted in the arrest of witnesses and failure to enforce the ordinance against other groups, such as the Adventists, would raise entirely distinct issues.

A further and important disclaimer must be made in order to focus attention sharply upon the constitutional issue. This dissent does not express, directly or by inference, any conclusion as to the constitutional rights of state or federal governments to place a privilege tax upon the soliciting of a free-will contribution for religious purposes. Petitioners suggest that their books and pamphlets are not sold but are given either without price or in appreciation of the recipient's gift for the furtherance of the work of the witnesses. The pittance sought, as well as the practice of leaving books with poor people without cost, gives strength to this argument. In our judgment, however, the plan of national distribution by the Watch Tower Bible & Tract Society, with its wholesale prices of five or twenty cents per copy for books,

delivered to the public by the witnesses at twenty-five cents per copy, justifies the characterization of the transaction as a sale by all the state courts. The evidence is conclusive that the witnesses normally approach a prospect with an offer of a book for twenty-five cents. Sometimes, apparently rarely, a book is left with a prospect without payment. The quid pro quo is demanded. If the profit was greater, twenty cents or even one dollar, no difference in principle would emerge. The witness sells books to raise money for propagandising his faith, just as other religious groups might sponsor bazaars or peddle tickets to church suppers or sell Bibles or prayer books for the same object. However high the purpose or noble the aims of the witness, the transaction has been found by the state courts to be a sale under their ordinances and, though our doubt was greater than it is, the state's conclusion would influence us to follow its determination.¹

In the opinion in *Jones v. Opelika*, 316 U. S. 584, on the former hearing, attention was called to the differentiation between these cases of taxation and those of forbidden censorship, prohibition or discrimination. There is no occasion to repeat what has been written so recently as to the constitutional right to tax the money

¹The Court in the *Murdock* case analyzes the contention that the sales technique partakes of commercialism and says: "It is a distortion of the facts of record to describe their activities as the occupation of selling books and pamphlets. And the Pennsylvania court did not rest the judgments of conviction on that basis, though it did find that petitioners 'sold' the literature." The state court, in its opinion, 149 Pa. Superior Ct. 175, stated the applicable ordinance as forbidding sales of merchandise by canvassing without a license, and said that the evidence established its violation by selling "two books entitled 'Salvation' and 'Creation' respectively, and certain leaflets or pamphlets, all published by the Watch Tower Bible and Tract Society of Brooklyn, N. Y., for which the society fixed twenty-five cents each as the price for the books and five cents each as the price of the leaflets. Defendants paid twenty cents each for the books, unless they devoted their whole time to the work, in which case they paid five cents each for the books they sold at twenty-five cents. Some of the witnesses spoke of 'contributions' but the evidence justified a finding that they sold the books and pamphlets."

The state court then repeated with approval from one of its former decisions the statements: "The constitutional right of freedom of worship does not guarantee anybody the right to sell anything from house to house or in buildings, belonging to, or in the occupancy of, other persons." "we do not accede to his contention on the oral argument that the federal decisions relied upon by him go so far as to rule that the constitutional guaranty of a free press forbids dealers in books and printed matter being subjected to our State mercantile license tax or the federal income tax as to such sales, along with dealers in other merchandise." *Pittsburgh v. Ruffner*, 134 Pa. Superior Ct. 192, 199, 202. And after further discussion of selling, the conviction of the witnesses was affirmed. It can hardly be said, we think, that the state court did not treat the Jeannette canvassers as engaged in a commercial activity or occupation at the time of their arrests.

raising activities of religious or didactic groups. There are, however, other reasons not fully developed in that opinion that add to our conviction that the Constitution does not prohibit these general occupational taxes:

The real contention of the witnesses is that there can be no taxation of the occupation of selling books and pamphlets because to do so would be contrary to the due process clause of the Fourteenth Amendment, which now is held to have drawn the contents of the First Amendment into the category of individual rights protected from state deprivation. *Gillow v. New York*, 268 U. S. 652, 666; *Near v. Minnesota*, 283 U. S. 697, 707; *Cantwell v. Connecticut*, 310 U. S. 296, 303. Since the publications teach a religion which conforms to our standards of legality, it is urged that these ordinances prohibit the free exercise of religion and abridge the freedom of speech and of the press.

The First Amendment reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

It was one of twelve proposed on September 25, 1789, to the States by the First Congress after the adoption of the Constitution. Ten were ratified. They were intended to be and have become our Bill of Rights. By their terms our people have a guarantee that so long as law as we know it shall prevail, they shall live protected from the tyranny of the despot or the mob. None of the provisions of our Constitution is more venerated by the people or respected by legislatures and the courts than those which proclaim for our country the freedom of religion and expression. While the interpreters of the Constitution find the purpose was to allow the widest practical scope for the exercise of religion and the dissemination of information, no jurist has ever conceived that the prohibition of interference is absolute.² Is subjection to non-discriminatory, nonexcessive taxation in the distribution of religious literature, a prohibition of the exercise of religion or an abridgment of the freedom of the press?

Nothing has been brought to our attention which would lead to the conclusion that the contemporary advocates of the adoption

² *Whitney v. California*, 274 U. S. 357, 371, and the concurring opinion, 373; *Reynolds v. United States*, 98 U. S. 145, 166; *Cantwell v. Connecticut*, 310 U. S. 296, 303; *Cox v. New Hampshire*, 312 U. S. 569, 574, 576.

of a Bill of Rights intended such an exemption. The words of the Amendment do not support such a construction. "Free" cannot be held to be without cost but rather its meaning must accord with the freedom guaranteed. "Free" means a privilege to print or pray without permission and without accounting to authority for one's actions. In the Constitutional Convention the proposal for a Bill of Rights of any kind received scant attention.³ In the course of the ratification of the Constitution, however, the absence of a Bill of Rights was used vigorously by the opponents of the new government. A number of the states suggested amendments. Where these suggestions have any bearing at all upon religion or free speech, they indicate nothing as to any feeling concerning taxation either of religious bodies or their evangelism.⁴ This was not because freedom of religion or free speech was not understood. It was because the subjects were looked upon from standpoints entirely distinct from taxation.⁵

³ Journal of the Convention, 369; II Farrand, *The Records of the Federal Convention*, 611, 616-8, 620. Cf. McMaster & Stone, *Pennsylvania and the Federal Constitution*, 251-3.

⁴ I Elliot's *Debates on the Federal Constitution* (1876) 319 *et seq.* In ratifying the Constitution the following declarations were made: *New Hampshire*, p. 326, "XI. Congress shall make no laws touching religion, or to infringe the rights of conscience." *Virginia*, p. 327, " . . . no right, of any denomination, can be cancelled, abridged, restrained, or modified, by the Congress, by the Senate or House of Representatives, acting in any capacity, by the President, or any department or officer of the United States, except in those instances in which power is given by the Constitution for those purposes; and that among other essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, or modified, by any authority of the United States." *New York*, p. 328, "That the freedom of the press ought not to be violated or restrained." After the submission of the amendments, *Rhode Island* ratified and declared, pp. 334, 335, "IV. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force and violence; and therefore all men have a natural, equal, and unalienable right to the exercise of religion according to the dictates of conscience; and that no particular religious sect or society ought to be favored or established, by law, in preference to others. . . . XVI. That the people have a right to freedom of speech, and of writing and publishing their sentiments. That freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated."

⁵ The Articles of Confederation had references to religion and free speech: "Article III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever."

"Article V. . . . Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and

The available evidence of Congressional action shows clearly that the draftsmen of the amendments had in mind the practice of religion and the right to be heard, rather than any abridgment or interference with either by taxation in any form.⁶ The amendments were proposed by Mr. Madison. He was careful to explain to the Congress the meaning of the amendment on religion. The draft was commented upon by Mr. Madison when it read:

imprisonments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace."

The Statute of Religious Freedom was passed in Virginia in 1785. The substance was in paragraph II: "*Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.*" 12 Henning Statutes of Va. 86.

A number of the states' constitutions at the time of the adoption of the Bill of Rights contained provisions as to a free press:

Georgia, Constitution of 1777, Art. LXI. "Freedom of the press and trial by jury to remain inviolate forever." 1 Poore, Federal and State Constitutions 383.

Maryland, Constitution of 1776, Declaration of Rights, Art. XXXVIII. "That the liberty of the press ought to be inviolably preserved." *Id.*, 820. Massachusetts, Constitution of 1780, Part First, Art. XVI. "The liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this commonwealth." *Id.*, 959.

New Hampshire, Constitution of 1784, Part 1, Art. XXII. "The Liberty of the Press is essential to the security of freedom in a state; it ought, therefore, to be inviolably preserved." 2 Poore, *id.*, 1282.

North Carolina, Constitution of 1776, Declaration of Rights, Art. XV. "That the freedom of the press is one of the great bulwarks of liberty, and therefore ought never to be restrained." *Id.*, 1410.

Pennsylvania, Constitution of 1776, Declaration of Rights, Art. XII. "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." *Id.*, 1542.

Virginia, Bill of Rights, 1776, Sec. 12. "That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments." *Id.*, 1909.

⁶ For example, the first amendment as it passed the House of Representatives on Monday, August 24, 1789, read as follows:

"Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed.

"The Freedom of Speech, and of the Press, and the right of the People peaceably to assemble, and consult for their common good, and to apply to the Government for a redress of grievances, shall not be infringed." Records of the United States Senate, 1A-C2 (U. S. Nat. Archives).

Apparently when the proposed amendments were passed by the Senate on September 9, 1789, what is now the first amendment read as follows:

"Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition to the government for a redress of grievances." *Id.*

"no religion shall be established by law, nor shall the equal rights of conscience be infringed." 1 Annals of Congress 729.

He said that he apprehended the meaning of the words on religion to be that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. *Id.*, 730. No such specific interpretation of the amendment on freedom of expression has been found in the debates. The clearest is probably from Mr. Benson⁷ who said that

"The committee who framed this report proceeded on the principle that these rights belonged to the people; they conceived them to be inherent; and all that they meant to provide against was their being infringed by the Government." *Id.*, 731-32.

There have been suggestions that the English taxes on newspapers, springing from the tax act of 10 Anne, c. 19, Sec. CI,⁸ influenced the adoption of the First Amendment.⁹ These taxes were obnoxious but an examination of the sources of the suggestion is convincing that there is nothing to support it except the fact that the tax on newspapers was in existence in England and

⁷ Egbert Benson was the first attorney general of New York, a member of the Continental Congress and of the New York Convention for ratification of the Constitution. Biographical Directory of the American Congress, 694.

⁸ "And be it enacted by the Authority aforesaid, That there shall be raised, levied, collected and paid, to and for the Use of her Majesty, her Heirs and Successors, for and upon all Books and Papers commonly called Pamphlets, and for and upon all News Papers, or Papers containing publick News, Intelligence or Occurrences, which shall, at any Time or Times within or during the Term last mentioned, be printed in Great Britain, to be dispersed and made publick, and for and upon such Advertisements as are herein after mentioned, the respective Duties following; that is to say,

"For every such Pamphlet or Paper contained in Half a Sheet, or any lesser Piece of Paper, so printed, the Sum of one Half-penny Sterling.

"For every such Pamphlet or Paper (being larger than Half a Sheet, and not exceeding one whole Sheet) so printed, a Duty after the Rate of one Penny Sterling for every printed Copy thereof.

"And for every such Pamphlet or Paper, being larger than one whole Sheet, and not exceeding six Sheets in Octavo, or in a lesser Page, or not exceeding twelve Sheets in Quarto, or twenty Sheets in Folio, so printed, a Duty after the Rate of two Shillings Sterling for every Sheet of any kind of Paper which shall be contained in one printed Copy thereof.

"And for every Advertisement to be contained in the *London Gazette*, or any other printed Paper, such Paper being dispersed or made publick weekly, or oftner, the Sum of twelve Pence Sterling."

⁹ Stevens, Sources of the Constitution, 221, note 2; Stewart, Lennox and the Taxes on Knowledge, 15 Scottish Hist. Rev. 322, 326; McMaster & Stone, Pennsylvania and the Federal Constitution, 181; Grosjean v. American Press Co., 297 U. S. 233, 248.

was disliked.¹⁰ The simple answer is that if there had been any purpose of Congress to prohibit any kind of taxes on the press its knowledge of the abominated English taxes would have led it to ban them unequivocally.

It is only in recent years that the freedoms of the First Amendment have been recognized as among the fundamental personal rights protected by the Fourteenth Amendment from impairment by the states.¹¹ Until then these liberties were not deemed to be guarded from state action by the Federal Constitution.¹² The states placed restraints upon themselves in their own constitutions in order to protect their people in the exercise of the freedoms of speech and of religion.¹³ Pennsylvania may be taken as a fair example. Its constitution reads:

"All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience and no preference shall ever be given by law to any religious establishments or modes of worship." Purdon's Penna. Stat., Const., Art. I, Sec. 3.

"No person who acknowledges the being of a God, and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth." *Id.*, Art. I, Sec. 4.

"The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. . . ." *Id.*, Art. I, Sec. 7.

It will be observed that there is no suggestion of freedom from taxation, and this statement is equally true of the other state constitutional provisions. It may be concluded that neither in the

¹⁰ Cf. Collet, *Taxes on Knowledge*; Chafee, *Free Speech in the United States*, 17, n. 33.

¹¹ *Gitlow v. New York* (1925), 268 U. S. 652, 666; *Near v. Minnesota*, 283 U. S. 697, 707; *Cantwell v. Connecticut*, 310 U. S. 296, 307.

¹² *Permoli v. First Municipality*, 3 How. 589, 609; *Barroa v. Baltimore*, 7 Pet. 243, 247.

¹³ For the state provisions on expression and religion, see 2 Cooley, *Constitutional Limitations* (8th Ed.) 876, 965; III *Constitutions of the States*, New York State Con. Con. Committee 1938.

state or the federal constitutions was general taxation of church or press interdicted.

Is there anything in the decisions of this Court which indicates that church or press is free from the financial burdens of government? We find nothing. Religious societies depend for their exemptions from taxation upon state constitutions or general statutes, not upon the Federal Constitution. *Gibbons v. District of Columbia*, 116 U. S. 404. This Court has held that the chief purpose of the free press guarantee was to prevent previous restraints upon publication. *Near v. Minnesota*, 283 U. S. 697, 713.¹⁴ In *Grosjean v. American Press Co.*, 297 U. S. 233, 250, it was said that the predominant purpose was to preserve "an untrammelled press as a vital source of public information." In that case, a gross receipt tax on advertisements in papers with a circulation of more than twenty thousand copies per week was held invalid because "a deliberate and calculated device in the guise of a tax to limit the circulation. . . ." There was this further comment:

"It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government. But this is not an ordinary form of tax, but one single in kind, with a long history of hostile misuse against the freedom of the press." *Id.*, 250.

It may be said, however, that ours is a too narrow, technical and legalistic approach to the problem of state taxation of the activities of church and press; that we should look not to the expressed or historical meaning of the First Amendment but to the broad principles of free speech and free exercise of religion which pervade our national way of life. It may be that the Fourteenth Amendment guarantees these principles rather than the more definite concept expressed in the First Amendment. This would mean that as a Court, we should determine what sort of liberty it is that the due process clause of the Fourteenth Amendment guarantees against state restrictions on speech and church.

But whether we give content to the literal words of the First Amendment or to principles of the liberty of the press and the church, we conclude that cities or states may levy reasonable, non-discriminatory taxes on such activities as occurred in these

¹⁴ To this Professor Chafee adds the right to criticize the Government. *Free Speech in the United States* (1941) 18 *et seq.* Cf. 2 Cooley's Constitutional Limitations (8th Ed.) 886.

cases. Whatever exemptions exist from taxation arise from the prevailing law of the various states. The constitutions of Alabama and Pennsylvania; with substantial similarity to the exemption provisions of other constitutions, forbid the taxation of lots and buildings used exclusively for religious worship. Alabama (1901), sec. 91; Pennsylvania (1874), Art. IX, sec. 1. These are the only exemptions of the press or church from taxation. We find nothing more applicable to our problem in the other constitutions. Surely this unanimity of specific state action on exemptions of religious bodies from taxes would not have occurred throughout our history, if it had been conceived that the genius of our institutions, as expressed in the First Amendment, was incompatible with the taxation of church or press.

Nor do we understand that the Court now maintains that the Federal Constitution frees press or religion of any tax except such occupational taxes as those here levied. Income taxes, ad valorem taxes, even occupational taxes are presumably valid, save only a license tax on sales of religious books. Can it be that the Constitution permits a tax on the printing presses and the gross income of a metropolitan newspaper¹⁵ but denies the right to lay an occupational tax on the distributors of the same papers? Does the exemption apply to booksellers or distributors of magazines or only to religious publications? And if the latter to what distributors? Or to what books? Or is this Court saying that a religious practice of book distribution is free from taxation because a state cannot prohibit the "free exercise thereof" and a newspaper is subject to the same tax even though the same Constitutional Amendment says the state cannot abridge the freedom of the press? It has never been thought before that freedom from taxation was a perquisite attaching to the privileges of the First Amendment. The national Government grants exemptions to ministers and churches because it wishes to do so, not because the Constitution compels. Internal Revenue Code, §§ 22(b)(6), 101(6), 812(d), 1004(a)(2)(B). Where camp meetings or revivals charge admissions, a federal tax would apply, if Congress had not granted freedom from the exaction. *Id.*, § 1701.

It is urged that such a tax as this may be used readily to restrict the dissemination of ideas. This must be conceded but the possibility of misuse does not make a tax unconstitutional.

¹⁵ *Giragi v. Moore*, 301 U. S. 670; 48 Ariz. 33; 49 Ariz. 74.

No abuse is claimed here. The ordinances in some of these cases are the general occupation license type covering many businesses. In the *Jeannette* prosecutions, the ordinance involved lays the usual tax on canvassing or soliciting sales of goods, wares and merchandise. It was passed in 1898. Every power of taxation or regulation is capable of abuse. Each one to some extent prohibits the free exercise of religion and abridges the freedom of the press but that is hardly a reason for denying the power. If the tax is used oppressively, the law will protect the victims of such action.

This decision forces a tax subsidy notwithstanding our accepted belief in the separation of church and state. Instead of all bearing equally the burdens of government, this Court now fastens upon the communities the entire cost of policing the sales of religious literature. That the burden may be heavy is shown by the record in the *Jeannette* cases. There are only eight prosecutions but one hundred and four witnesses solicited in *Jeannette* the day of the arrests. They had been requested by the authorities to await the outcome of a test case before continuing their canvassing. The distributors of religious literature, possibly of all informatory publications, become today privileged to carry on their occupations without contributing their share to the support of the government which provides the opportunity for the exercise of their liberties.

Nor do we think it can be said, properly, that these sales of religious books are religious exercises. The opinion of the Court in the *Jeannette* cases emphasizes for the first time the argument that the sale of books and pamphlets is in itself a religious practice. The Court says the witnesses "spread their versions of the Gospel largely through the distribution of religious literature by full or part time workers." The hand distribution of religious tracts is an age-old form of missionary evangelism—as old as the history of printing presses." "It is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting. This form of evangelism occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits." "Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance." "The judgment in *Jones v. Opelika* has this day been vacated. Freed

religious activity

interpretation

hand

Bibles and their religious beliefs

their
Literature
from that controlling precedent, we can restore to their high, constitutional position the liberties of itinerant evangelists who disseminate religious beliefs and the tenets of their faith through distribution of ~~the printed word~~. The record shows that books entitled "Creation" and "Salvation", as well as Bibles, were offered for sale. We shall assume the first two publications, also, are religious books. Certainly there can be no dissent from the statement that selling religious books is an age-old practice or that it is evangelism in the sense that the distributors hope the readers will be spiritually benefited. That does not carry us to the conviction, however, that when distribution of religious books is made at a price, the itinerant colporteur is performing a religious rite, is worshipping his Creator in his way. Many sects practice healing the sick as an evidence of their religious faith or maintain orphanages or homes for the aged or teach the young. These are, of course, in a sense, religious practices but hardly such examples of religious rites as are encompassed by the prohibition against the free exercise of religion.

And even if the distribution of religious books was a religious practice protected from regulation by the First Amendment, certainly the affixation of a price for the articles would destroy the sacred character of the transaction. The evangelist becomes also a book agent.

The rites which are protected by the First Amendment are in essence spiritual—prayer, mass, sermons, sacrament—not sales of religious goods. The card furnished each witness to identify him as an ordained minister does not go so far as to say the sale is a rite. It states only that the witnesses worship by exhibiting to people "the message of said gospel in printed form, such as the Bible, books, booklets and magazines, and thus afford the people the opportunity of learning of God's gracious provision for them." On the back of the card appears: "You may contribute twenty-five cents to the Lord's work and receive a copy of this beautiful book." The sale of these religious books has, we think, relation to their religious exercises, similar to the "information march,"

said by the witnesses to be one of their "ways of worship" and by this Court to be subject to regulation by license in *Cox v. New Hampshire*, 312 U. S. 569, 572, 573, 576.

The attempted analogy in the dissenting opinion in *Jones v. Opelika*, 316 U. S. 584, 609, 611, which now becomes the decision of this Court, between the forbidden burden of a state tax for the privilege of engaging in interstate commerce and a state tax on the privilege of engaging in the distribution of religious literature is wholly irrelevant. A state tax on the privilege of engaging in interstate commerce is held invalid because the regulation of commerce between the states has been delegated to the Federal Government. This grant includes the necessary means to carry the grant into effect and forbids state burdens without Congressional consent.¹⁶ It is not the power to tax interstate commerce which is interdicted but the exercise of that power by an unauthorized sovereign, the individual state. Although the fostering of commerce was one of the chief purposes for organizing the present Government, that commerce may be burdened with a tax by the United States. Internal Revenue Code, § 3469. Commerce must pay its way. It is not exempt from any type of taxation if imposed by an authorized authority. The Court now holds that the First Amendment wholly exempts the church and press from a privilege tax, presumably by the national as well as the state governments.

The limitations of the Constitution are not maxims of social wisdom but definite controls on the legislative process. We are dealing with power, not its abuse. This late withdrawal of the power of taxation over the distribution activities of those covered by the First Amendment fixes what seems to us an unfortunate principle of tax exemption, capable of indefinite extension. We had thought that such an exemption required a clear and certain grant. This we do not find in the language of the First and Fourteenth Amendment. We are therefore of the opinion the judgments below should be affirmed.

Mr. Justice ROBERTS, Mr. Justice FRANKFURTER, and Mr. Justice JACKSON join in this dissent. Mr. Justice JACKSON has stated additional reasons for dissent in his concurrence in *Douglas v. Jeannette*, decided this day.

¹⁶ *Brown v. Maryland*, 12 Wheat. 419, 445, 448; *Kentucky Whip & Collar Co. v. I. C. R. Co.*, 299 U. S. 334, 350; *Gwin, etc., Inc. v. Henneford*, 305 U. S. 434, 438; *Puget Sound Co. v. Tax Commission*, 302 U. S. 90.

Mr. Justice FRANKFURTER, dissenting.

While I wholly agree with the views expressed by Mr. Justice REED, the controversy is of such a nature as to lead me to add a few words.

A tax can be a means for raising revenue, or a device for regulating conduct, or both. Challenge to the constitutional validity of a tax measure requires that it be analyzed and judged in all its aspects. We must therefore distinguish between the questions that are before us in these cases and those that are not. It is altogether incorrect to say that the question here is whether a state can limit the free exercise of religion by imposing burdensome taxes. As the opinion of my Brother REED demonstrates, we have not here the question whether the taxes imposed in these cases are in practical operation an unjustifiable curtailment upon the petitioners' undoubted right to communicate their views to others. No claim is made that the effect of these taxes, either separately or cumulatively, has been or is likely to be to restrict the petitioners' religious propaganda activities in any degree. Counsel expressly disclaim any such contention. They insist on absolute immunity from any kind of monetary exaction for their occupation. Their claim is that no tax, no matter how trifling, can constitutionally be laid upon the activity of distributing religious literature, regardless of the actual effect of the tax upon such activity. That is the only ground upon which these ordinances have been attacked, that is the only question raised in or decided by the state courts, and that is the only question presented to us. No complaint is made against the size of the taxes. If an appropriate claim, indicating that the taxes were oppressive in their effect upon the petitioners' activities, had been made, the issues here would be very different. No such claim has been made, and it would be gratuitous to consider its merits.

Nor have we occasion to consider whether these measures are invalid on the ground that they unjustly or unreasonably discriminate against the petitioners. Counsel do not claim, as indeed they could not, that these ordinances were intended to or have been applied to discriminate against religious groups generally or Jehovah's Witnesses particularly. No claim is made that the effect of the taxes is to hinder or restrict the activities of Jehovah's Witnesses while other religious groups, perhaps older

or more prosperous, can carry on theirs. This question, too, is not before us.

It cannot be said that the petitioners are constitutionally exempt from taxation merely because they may be engaged in religious activities or because such activities may constitute an exercise of a constitutional right. It will hardly be contended, for example, that a tax upon the income of a clergyman would violate the Bill of Rights, even though the tax is ultimately borne by the members of his church. A clergyman, no less than a judge, is a citizen. And not only in time of war would neither willingly enjoy immunity from the obligations of citizenship. It is only fair that he also who preaches the word of God should share in the costs of the benefits provided by government to him as well as to the other members of the community. And so no one would suggest that a clergyman who uses an automobile or the telephone in connection with his work thereby gains a constitutional exemption from taxes levied upon the use of automobiles or upon telephone calls. Equally alien is it to our constitutional system to suggest that the Constitution of the United States exempts church-held lands from state taxation. Plainly, a tax measure is not invalid under the federal Constitution merely because it falls upon persons engaged in activities of a religious nature.

Nor can a tax be invalidated merely because it falls upon activities which constitute an exercise of a constitutional right. The First Amendment of course protects the right to publish a newspaper or a magazine or a book. But the crucial question is—how much protection does the Amendment give, and against what is the right protected? It is certainly true that the protection afforded the freedom of the press by the First Amendment does not include exemption from all taxation. A tax upon newspaper publishing is not invalid simply because it falls upon the exercise of a constitutional right. Such a tax might be invalid if it invidiously singled out newspaper publishing for bearing the burdens of taxation or imposed upon them in such ways as to encroach on the essential scope of a free press. If the Court could justifiably hold that the tax measures in these cases were vulnerable on that ground, I would unreservedly agree. But the Court has not done so, and indeed could not.

The vice of the ordinances before us, the Court holds, is that they impose a special kind of tax, a "flat license tax, the payment

of which is a condition of the exercise of these constitutional privileges [to engage in religious activities]." But the fact that an occupation tax is a "flat" tax certainly is not enough to condemn it. A legislature undoubtedly can tax all those who engage in an activity upon an equal basis. The Constitution certainly does not require that differentiations must be made among taxpayers upon the basis of the size of their incomes or the scope of their activities. Occupation taxes normally are flat taxes, and the Court surely does not mean to hold that a tax is bad merely because all taxpayers pursuing the very same activities and thereby demanding the same governmental services are treated alike. Nor, as I have indicated, can a tax be invalidated because the exercise of a constitutional privilege is conditioned upon its payment. It depends upon the nature of the condition that is imposed, its justification, and the extent to which it hinders or restricts the exercise of the privilege.

As I read the Court's opinion, it does not hold that the taxes in the cases before us in fact do hinder or restrict the petitioners in exercising their constitutional rights. It holds that "The power to tax the exercise of a privilege is the power to control or suppress its enjoyment". This assumes that because the taxing power exerted in *Magnano Co. v. Hamilton*, 292 U. S. 40, the well-known oleomargarine tax case, may have had the effect of "controlling" or "suppressing" the enjoyment of a privilege and still was sustained by this Court, and because all exertions of the taxing power may have that effect, if perchance a particular exercise of the taxing power does have that effect, it would have to be sustained under our ruling in the *Magnano* case.

The power to tax, like all powers of government, legislative, executive and judicial alike, can be abused or perverted. The power to tax is the power to destroy only in the sense that those who have power can misuse it. Mr. Justice Holmes disposed of this smooth phrase as a constitutional basis for invalidating taxes when he wrote "The power to tax is not the power to destroy while this Courts sits." *Panhandle Oil Co. v. Knox*, 277 U. S. 218, 223. The fact that a power can be perverted does not mean that every exercise of the power is a perversion of the power. Thus, if a tax indirectly suppresses or controls the enjoyment of a constitutional privilege which a legislature cannot directly suppress or control, of course it is bad. But it is irrelevant that a tax can suppress or control if it does not. The Court holds that "Those who can tax

the exercise of this religious practice can make its exercise so costly as to deprive it of resources necessary for its maintenance". But this is not the same as saying that "Those who do tax the exercise of this religious practice have made its exercise so costly as to deprive it of the resources necessary for its maintenance."

The Court could not plausibly make such an assertion because the petitioners themselves disavow any claim that the taxes imposed in these cases impair their ability to exercise their constitutional rights. We cannot invalidate the tax measures before us simply because there may be others, not now before us, which are oppressive in their effect. The Court's opinion does not deny that the ordinances involved in these cases have in no way disabled the petitioners to engage in their religious activities. It holds only that "Those who can tax the privilege of engaging in this form of missionary evangelism can close its doors to all those who do not have a full purse." I quite agree with this statement as an abstract proposition. Those who possess the power to tax might wield it in tyrannical fashion. It does not follow, however, that every exercise of the power is an act of tyranny, or that government should be impotent because it might become tyrannical. The question before us now is whether these ordinances have deprived the petitioners of their constitutional rights, not whether some other ordinances not now before us might be enacted which might deprive them of such rights. To deny constitutional power to secular authority merely because of the possibility of its abuse is as valid as to deny the basis of spiritual authority because those in whom it is temporarily vested may misuse it.

The petitioners say they are immune as much from a flat occupation tax as from a licensing fee purporting explicitly to cover only the costs of regulation. They rightly reject any distinction between this occupation tax and such a licensing fee. There is no constitutional difference between a so-called regulatory fee and an imposition for purposes of revenue. The state exacts revenue to maintain the costs of government as an entirety. For certain purposes and at certain times a legislature may earmark exactions to cover the costs of specific governmental services. In most instances the revenues of the state are tapped from multitudinous sources for a common fund out of which the costs of government are paid. As a matter of public finance, it is often impossible to determine with nicety the governmental expenditures attributable to particular activities. But, in any event,

whether government collects revenue for the costs of its services through an earmarked fund, or whether an approximation of the cost of regulation goes into the general revenues of government out of which all expenses are borne, is a matter of legislative discretion and not of constitutional distinction. Just so long as an occupation tax is not used as a cover for discrimination against a constitutionally protected right or as an unjustifiable burden upon it, from the point of view of the Constitution of the United States it can make no difference whether such a money exaction for governmental benefits is labeled a regulatory fee or a revenue measure.

It is strenuously urged that the Constitution denies a city the right to control the expression of men's minds and the right of men to win others to their views. But the Court is not divided on this proposition. No one disputes it. All members of the Court are equally familiar with the history that led to the adoption of the Bill of Rights and are equally zealous to enforce the constitutional protection of the free play of the human spirit. Escape from the real issue before us cannot be found in such generalities. The real issue here is not whether a city may charge for the dissemination of ideas but whether the states have power to require those who need additional facilities to help bear the cost of furnishing such facilities. Street hawkers make demands upon municipalities that involve the expenditure of dollars and cents, whether they hawk printed matter or other things. As the facts in these cases show, the cost of maintaining the peace, the additional demands upon governmental facilities for assuring security, involve outlays which have to be met. To say that the Constitution forbids the states to obtain the necessary revenue from the whole of a class that enjoys these benefits and facilities, when in fact no discrimination is suggested as between purveyors of printed matter and purveyors of other things, and the exaction is not claimed to be actually burdensome, is to say that the Constitution requires not that the dissemination of ideas in the interest of religion shall be free but that it shall be subsidized by the state. Such a claim offends the most important of all aspects of religious freedom in this country, namely, that of the separation of church and state.

The ultimate question in determining the constitutionality of a tax measure is—has the state given something for which it can ask a return? There can be no doubt that these petitioners, like all who use the streets, have received the benefits of government. Peace is maintained, traffic is regulated, health is safeguarded—

these are only some of the many incidents of municipal administration. To secure them costs money, and a state's source of money is its taxing power. There is nothing in the Constitution which exempts persons engaged in religious activities from sharing equally in the costs of benefits to all, including themselves, provided by government.

I cannot say, therefore, that in these cases the community has demanded a return for that which it did not give. Nor am I called upon to say that the state has demanded unjustifiably more than the value of what it gave, nor that its demand in fact cramps activities pursued to promote religious beliefs. No such claim was made at the bar, and there is no evidence in the records to substantiate any such claim if it had been made. Under these circumstances, therefore, I am of opinion that the ordinances in these cases must stand.

Mr. Justice JACKSON joins in this dissent.